Presented to Babu Surendra Nath Mukerji M.A., B.L. Pleader as a token of affection.

35

STUDENT'S HAND-BOOK

OF

MAHOMMEDAN LAW

BY

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FOURTH EDITION.

Calcutta

THACKER SPINK AND CO.

1903.

CALCUTTA
PRINTED BY THACKER, SPINK AND CO.

PREFACE TO THE FOURTH EDITION.

THIS concise treatise on Mahommedan Law embodies within a short compass all the leading principles which are to be found dispersed in a mass of authorities, some wholly inaccessible to the ordinary practitioner or student, with references to the important decisions of the High Courts in India and of the Judicial Committee of the Privy Council which have either affirmed, explained or varied the rules of Mahommedan Law, and I am gratified to find that it has fully answered the purpose for which it was projected. In this new edition, additional matter has been inserted, which, I hope, will enhance its usefulness to the two classes for whom it is designed,—the practical lawyer, who requires a handy book of reference, and the student, who needs a compact treatise embodying the general principles.

AMEER ALI.

PREFACE TO THE FIRST EDITION.

THE purpose which this little work is intended to serve is sufficiently indicated by its title. Hitherto Macnaghten's compilation, made nearly half a century ago, has formed the *vade mecum* of students in this country as well as in England. In the absence of any better elementary treatise, Macnaghten's synopsis answered its purpose. It seems to me, however, that the principles of Mahomedan Law, carefully collected from the original authorities, should now be placed in the hands of students, arranged in a more systematic and connected form. The present work was undertaken at the request of friends interested in legal education, and my endeavour has been to give the recognised principles with a few references to important decided cases, in order to make it useful not only to the student but also to the ordinary practitioner.

I have added in an appendix certain principles perhaps important to practitioners but unnecessary for students.

CALCUTTA,
December, 1891.

AMEER ALI.

CONTENTS.

PART I.

The Law Relating to Succession.

CHAPTER I.

CHAPTER II.

Hanafi Law of Succession.

CHAPTER III.

CHAPTER IV.

PART II.

The Law Relating to Status.

CHAPTER I.

The Status of Legitimacy.

CHAPTER II.

PRINCIPLES OF MAHOMMEDAN LAW.

PART I.

The Law Relating to Succession.

CHAPTER I.

GENERAL OBSERVATIONS.

Section I.

The Mahommedan world is divided into two sects, *viz.*, the Sunnis and the Shiahs. The question of the Imâmate, or the title to the spiritual and temporal headship of Islâm, forms the chief point of difference between them. The Sunnis are the advocates of the principal of election; the Shiahs, of apostolical descent by appointment and succession. This difference has given birth to two distinct systems or schools of law, both founded on the Koranic regulations but diverging upon the supplementary principles derived from the oral precepts of the Prophet and of his immediate descendants and disciples.

The Shiahs derive their law from the Koran and from the traditional sayings of the Prophet handed down by his descendants, and repudiate the validity of all decisions not passed by their own spiritual leaders and Imâms.

The Sunnis derive their law from the following sources:—

(1) the Koran; (2) the *Hadîs* or *Sunnat*, (traditions handed down from the Prophet by any person who saw or heard him); (3) the *Ijmâa-ul-Ummat*, (concordance among the followers) including all the explanations, glosses, and decisions of the leading disciples, especially of the first four Caliphs; (4) *Kiyâs*, the exercise of private judgment based on analogy.

The Shiah School was founded by the apostolical Imâm Jaafar as-Sâdik in the second century of the Hegira.[1] The principles of the Sunni system were not put into shape and regularly formulated until some time later.

The Shiah system represents the reforms introduced by the Arabian Prophet in the customary rules relating to inheritance prevalent among the Arabs; whilst the Sunni School retains largely the old Arabian customs by which "cognates" were excluded by "agnates." In fact until the time of the Caliph Mutazid bi'llâh in the year 896 A.C., "uterine relations" or "cognates" took no share in the inheritance of a deceased person. On failure of agnatic relations the property of the deceased escheated to the Caliph. Mutazid abolished the escheat office and directed that when there were neither sharers nor agnatic relations the property should go to the cognates instead of the Caliph.

1 The sixth Imâm of the Shiahs. He died in 148 A.H. (765 A.C.)

The Sunnis are divided into four sub-sects, *viz.*, the Hanafîs, Shâfeïs, Mâlikîs, and Hanbalîs, differing from each other not only on points of ritual and religious doctrine but also on legal questions and the interpretation of legal principles. They thus form four sub-schools of law.

The Hanafîs are the followers of Imâm Abû Hanîfa, who had studied jurisprudence under the Imâm Jaafar as-Sâdik. Practically, they follow Abû Hanîfa's disciples, Abû Yusuf and Mohammed, in preference to Abû Hanîfa. Abû Yusuf was the Chief Kâzi of Bagdad in the time of the Caliph Hârûn ar-Rashîd, and as he was a practical lawyer, his views are recognised as binding on all questions relating to dispositions of property. The Sunni Mahommedans of India are chiefly Hanafîs. Shâfeïsm, however, has made great progress in this country within the last few years.

The Shâfeïs are the followers of Imâm Shâfeï, who died in Egypt in 819 A.C., and are chiefly to be found in Arabia, Egypt, Northern Africa, among a part of the Borahs of Bombay and the Malayans.

The Mâlikîs are the followers of Imâm Mâlik bin Ans who died in the year 179 A.H., and they are to be found in Arabia and Northern Africa.

The Hanbalîs, the followers of Imâm Ahmed bin Hanbal, though few in number, exist chiefly in parts of Hazramaut (Hadramaut) and Oman.

The Shiahs are divided into several sub-sects, but the word *Shiah* is now-a-days applied exclusively to the Asnâ-Aasharias[1] or the followers of the twelve Imâms. The Asnâ-

[1] Duo-decemians; generally called in India, *Imâmias* or followers of the Imâms.

Aasharias are again divided into two sub-sects, *viz.*, the Usûlis and the Akhbâris, who form separate schools of law. The Usûlis accept only such traditions as are found to be genuine upon a most critical exegesis, and allow the full exercise of private judgment in the application and interpretation of legal principles. The Akhbâris are guided entirely by the expositions of their *mujtahids* or "expounders of law."

Another important sect is that of the Mutazalas, who in some of their interpretations of the law, differ completely from the other schools; this school was founded by Wâsil bin Aatâ in the eighth century of the Christian era.

The Khojahs, who are to be found in the Bombay Presidency, belong, like many of the Borahs, to a Shiah sect called Ismailia; but on questions of inheritance they are governed chiefly by Hindu customs. On questions relating to dispositions of property, they are generally subject to the Shiah Law.

A majority of the Borahs are Ismailias. They do not, however, follow the Imâm of the Khojahs. Their spiritual preceptor is said to be in Yemen. They are divided into two groups, *viz.*, *Sulaimâni* and *Dâûdi*. They are governed by the general principles of the Mahommedan Law.

In the Islâmic system, the different schools and sub-schools are so intimately connected with the different persuasions, sects or communions to which they appertain, that when a person belonging to one communion or sect or sub-sect goes over to another, his status and the dispositions made by him, as well as the succession to his inheritance, are thenceforward governed by the rules of the school to

which he now belongs. For example, a Shiah, on adopting the Sunni persuasion, would subject himself to the Sunni Law. So a Hanafî becoming a Shâfeïte, or an Akhbârî becoming an Usûli would be governed by the Shâfeï or Usûli principles as the case may be and *vice versâ*. From this point of view it may be said that the entire Mussulman Law is a personal law.

One great outward distinction between the Shiahs and the Sunnis is, that whilst the former pray with their hands held straight down by their side, the latter offer their prayers with hands folded in front. Between the Hanafîs and the Shâfeïs, the difference consists in the former pronouncing the word *âmîn* (amen) in their prayers in a low voice, whilst the latter pronounce it loudly.

Section II.

In the Mahommedan Law there is no distinction between ancestral and self-acquired property. The owner for the time being has absolute dominion over all property in his possession, whether he has acquired it himself or whether it has devolved upon him by inheritance. He can sell or dispose of it in any way he likes, provided operation is given to the transaction during his lifetime. It is only with regard to dispositions intended to take effect after the donor's death or made *in extremis* that his power of disposition is limited by the right of his heirs.

Females co-existing with males of the same degree (or of a lower degree, but entitled to succeed with them) take a smaller share than the males, but as regards dominion over property and the power of disposition and the *quan-*

tum of interest derived by inheritance, they stand on the same footing as the men. So also a widow taking a share in her husband's estate acquires an absolute and indefeasible interest therein.

Nor, so far as succession is concerned, is there any distinction between real and personal property, excepting in one case under the Shiah Law.[1]

Among the Mahommedans, there is no presumption of jointness.[2] In some parts of India, however, Mahommedan families have adopted the Hindu joint-family system. In many instances, Hindu families converted to Islâm have adhered to the old custom and continued to live jointly.

In such cases, the legal rights of the parties have been held to be subject to the same principles as are applicable to members of a Hindu joint family.[3] Where Mahommedan families have adopted Hindu customs or Hindu families converted to Islâm have adhered to old customs, they have frequently done so, subject to such modifications as they considered desirable. A Judge, therefore, is not bound nor would he be justified, as a matter of law, to apply to a Mahommedan family all the rules and presumptions which have been held to apply to a joint Hindu family.[4]

When a custom is put forward for excluding females

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[1] See *post*, p. 45.

[2] *Hakim Khan* v. *Gul Khan*, I.L.R., 8 Cal., 823; S.C., 10 Cal., L.R., 603; *Jowala Buksh* v. *Dharam Sing*, 10 Moo. Ind. App., 511; see also *Abraham* v. *Abraham*, 9 Moo. Ind. App., 195; and *Jaker Ali Chowdhry* v. *Rajchunder Sen*, I.L.R., Cal., 831, note.

[3] See *Ackina Bibee* v. *Ajûjannissa Bibee*, 11 Weekly Rep., 45.

[4] *Suddurtonissa* v. *Majida Khatun*, I.L.R., 3 Cal., 694; S.C., 2 Cal., L.R., 308.

from succession, it must be shown that it was consciously accepted as having the force of law, and fulfils all the requirements by which a valid custom is established.[1]

But the mere fact that members of a Mahommedan family are living in commensality and holding their properties jointly is not sufficient to raise the presumptions which, under the Hindu Law, arise from jointness.[2]

But where members of a Mahommedan family are living joint, and it is found that they are jointly in enjoyment of their shares in the properties which have descended to them from a common ancestor, the managing member cannot claim an exclusive right to those properties or assert that the rights of the other members have become barred under the Statute of Limitation.[3]

As regards the Khojahs and Cutchi Memons, the Bombay High Court has held that in the absence of satisfactory proof of custom differing from the Hindu Law, the Courts will apply to them the Hindu Law of Inheritance and Succession.[4]

Claims of inheritance based on alleged customs which are immoral in their tendency and are reprobated or prohibited by the Mahommedan Law are not valid.[5]

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[1] *Mira Bivi* v. *Villayana*, I.L.R., 8 Mad., 460.

[2] *Abdool Adood* v. *Mohammud Mahmil*, I.L.R., 10 Cal., 562.

[3] *Ackina Bibee* v. *Ajujanissa Bibee*, 11 W.R., 45.

[4] See *Hirbai* v. *Sonabai*, Perry's *Oriental Cases*, 110; *Hirbai* v. *Gorbai*, 12 Bom., H.C.R., 294; *Rahmatbai* v. *Kirbai*, I.L.R., 3 Bom., 34; *Mahomed Sidick* v. *Ahmed Abdul Haji Abdul Satoo*, I.L.R., 13 Bom., 280.

[5] *Ghasiti* v. *Umrao Jan*, I.L.R., 21 Cal., 149; *Ghasiti* v. *Juggse*, L.L.R., 20 I.A., 193.

In order to distinguish between the inheriting and non-inheriting kinsmen of a *propositus*, it is recognised, as a general rule by both the schools, that when a deceased Mussulman leaves behind him two relations, one of whom is connected with him through the other, the former shall not succeed whilst the intermediate person is alive. For example, if a person on his death leaves behind him a son and *that son's* son, this latter will not succeed to his grandfather's estate while the father is alive. But this rule is subject to one exception. Under the Sunni Law, the mother does not exclude brothers and sisters, either full or uterine, from succession.

Another rule framed also with the same object is, that the *nearer in degree* excludes *the more remote*. This rule, though really covered by the former, is recognised by both the schools, but there is great divergence as to the mode of its application in consequence of the difference in the classification of heirs. For example, the Sunnis group the heirs under two heads, *viz.*, agnates and cognates; and the agnates and cognates are respectively sub-divided into descendants, ascendants, and collaterals. The object of this division as well as sub-division is to indicate the order of succession; and the rule applies to each class of heirs, but not to the heirs of different classes. For instance, a son will take in preference to a son's son, both being in the first class of heirs; but a son's son will take the residue in preference to the father, although the latter is nearer than the former, because the father is included in the second class of heirs.

Similarly, the Shiahs divide the heirs into three classes

but without any distinction between agnates and cognates. Each of these classes is sub-divided into two branches: the above rule applies to the heirs of the different classes but not to heirs of the two branches of the same class. For instance the parents and the descendants form the first class, and are its two branches; accordingly a great-grandson although he will not exclude a father, will take in preference to the grandfather or brother, notwithstanding that these are nearer in kinship, for they belong to different classes. Similarly, a grandfather cannot exclude a brother's grandson, for they belong to different branches of the same class. Thus the rule must be understood to be subject in its application to the classification of heirs, in which respect only is there a distinction between the two schools. It will be seen by and by that the Sunnis prefer the *nearer in degree* to the more remote in the succession of *male agnates* only, whilst the Shiahs apply the rule of nearness or propinquity to all cases without distinction of class or sex. If a person die leaving behind him a brother's son and a brother's grandson, and his own daughter's son—among the Sunnis, the brother's son, being a male agnate and nearer to the deceased than the brother's grandson, takes the inheritance in preference to the others; whilst among the Shiahs, the daughter's son, being nearer in blood, would exclude the others.

Thus the right of succession of the different relations who may survive a deceased person varies according to circumstances. Some of them are absolutely excluded by the operation of the principles referred to above, whilst others have their shares reduced by the fact of their

co-existing with certain relations who may or may not participate in the inheritance. But both among the Sunnis and the Shiahs there is one class of heirs who are never excluded from succession, however much their respective shares may vary. This class of heirs comprises the father, the mother, the son, the daughter, the husband or wife.

As a general rule neither the Sunnis nor the Shiahs recognise the principle of representation. For example, if *A* had two sons, one of whom died during his lifetime leaving several children, these children do not possess the right of representing their father on the decease of *A*, but are "excluded" from the inheritance by their uncle. Similarly, if there be two sons of one son or brother, and three of another (and no son or brother, as the case may be, living at the time), the five grandsons or brother's sons will take the inheritance *per capita* and not *per stirpes*. But the right of representation is recognised to a limited extent in the succession of the *cognates*. For example, half-sisters on the mother's side, when they do succeed, take the mother's share. There are some other instances of the same kind.

The rule of primogeniture is recognised in a qualified shape among the Shiahs, the Shâfeîs, and the Mâlikîs, who give to the eldest son the horse, the arms, the mantle, and the Koran of the father, thus allowing him a pre-eminent position among the children of the deceased. The Hanafîs, on the other hand, do not observe it at all. In certain families, however in India as elsewhere, the entire estate descends to the eldest son.

Among the *Ismailias*, the rule of primogeniture is generally recognised and acted upon.

When either of the parents is a Moslem, the Mussulman Law presumes the child to be a Moslem (until it is able to make a choice), and the right to its succession is regulated by the laws of Islâm.

Moslems inherit from each other, though they may belong to different sects, but the succession is regulated by the rules of the school to which the deceased belongs.[1]

Funeral expenses form the first charge on the estate of a deceased person; in other words, such expenses must be paid out first, then his or her debts, then any valid bequest left by the deceased, and after these legal duties have been performed, the inheritance is to be divided among the heirs. But a partition before payment of debts does not invalidate the division of the property, the heirs remaining liable for the debts in proportion to the assets received by each.[2] The estate of an intestate descends in its entirety to his heirs, together with all the debts due from or owing to deceased. The creditors therefore must enforce their claim in a suit properly framed for the purpose. Such a suit is properly framed if all the persons in possession of that particular portion of the estate which it is intended to charge are made parties to it. A decree against one heir cannot bind the others.[3]

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[1] See *Hyatunnissa* v. *Muhammad Ali Khan*, L.R., 17 I.A., 731 S.C., I.L.R., 12 All., 290.

[2] See *Muhammad Awais* v. *Harsahai*, I.L.R., 7 All., 716; *Jafri Begum* v. *Amir Muhammad Khan*, I.L.R., 7 All., 822. The latter case is the earlier of the two.

[3] *Assamathunnissa Bibee* v. *Roy Lutchmiput Singh*, I.L.R., 4 Cal., 142; see also *Hamir Singh* v. *Zakia*, I.L.R., 1 All., 57.

The creditors are entitled to have recourse to one of several heirs only when the entire assets are in his possession. Such a suit has been regarded as one for administration and a decree made therein has been held to be binding in the absence of fraud on the other heirs, although they were not joined in the action.[1]

A right of inheritance vests by operation of law and consequently although a relinquishment of the right of inheritance may be binding on the person actually renouncing[2] it does not affect anybody else. Thus an heir, who refuses to take the share in a deceased person's estate to which he is entitled, cannot deprive his own heirs of its benefit, and, accordingly, upon his death his rights would devolve upon them and they would be entitled to claim his share (subject, of course, to any bar resulting from the Statute of Limitation).

The Mahommedan Law, pure and simple, does not recognise vested estates in remainder. In other words, whilst the property is in the hands of the owner, his heirs have no vested reversionary interest in it such as would be assignable or pass to their heirs by right of inheritance.

But there is nothing in the Mahommedan Law to prevent an arrangement to the effect that *A* should have a life interest in a particular property which would descend to *A's* heirs or to some other person on his death.

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1 *Amir Dulhin* v. *Baijnath Singh*, I.L.R., 21 Cal., 311. The Allahabad High Court has taken a different view.

2 See *Hurmut ool-Nissa Begum* v. *Allahdia Khan*, 17 W.R., P.C., 108; *Kunhi Mamod* v. *Kunhi Moidin*, I.L.R., 19 Mad., 176.

CHAPTER II.

HANAFI LAW OF SUCCESSION.

SECTION I.—CLASSIFICATION OF HEIRS.

THE Sunnis recognise three classes of heirs :—

(1) The *Zav-il-furûz* (the "Sharers," persons whose shares are specified in the Koran).

(2) The *Asabâh*[1] (the "Agnates").

(3) The *Zav-il-arhâm*[2] ("Cognates" or "Uterine Relations").

The Sharers.—The "Sharers" take their specified portions, and the residue is then divided among the agnates. Should there be no agnates, the residue would revert or "return" to the sharers *other than the husband or wife.* If there happen to be neither such sharers nor agnates, then the estate is divided among the uterine relations.

The "Sharers," or *Zav-il-furûz*, are twelve in number, four males and eight females. Their shares are liable to variation, according to circumstances, and some of them are subject also to entire exclusion, owing to the operation of the two principles of elimination specified in Chapter I. The four males are : (1) the father, (2) the grandfather or *lineal*

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[1] Called by English writers "Residuaries."

[2] Called by English writers "the Distant Kindred." The word literally means "uterine relations" and signifies, generally speaking, relations connected with the deceased through females. It is equivalent to the word *bandhu* in Hindu Law.

male ascendant (when not excluded), (3) the *uterine* brothers, and (4) the husband. The females are: (1) wife, (2) daughter, (3) son's daughter, or the daughter of a *lineal male descendant* how low soever, (4) mother, (5) *true* grandmother, (6) full sister, (7) consanguine sister (*i.e.*, half-sister on the father's side), and (8) uterine sister (*i.e.*, half-sister on the mother's side).

1. *The Father.*—The Sunni lawyers attribute to the father three characters—(1) the character of a simple sharer when the deceased happens to leave a lineal male descendant; (2) the character of a simple residuary when he co-exists with a person who is only a sharer—as a husband or a wife, a mother or a grandmother—when he takes the residue of the estate after the allotment of the share or shares; and (3) the character of both a sharer and residuary, as when he co-exists with a daughter, or son's[1] daughter. In this case, he takes first his share and then becomes entitled to any residue after allotment of the daughter's or the son's daughter's share.

A father's share when the deceased leaves a son or son's son or lineal male descendants, like son's sons or son's son's son is $\frac{1}{6}$.

2. *A true* grandfather or lineal male ascendant (who is not excluded by the father or a nearer ascendant), $\frac{1}{6}$.

[The Sunnis or rather the Hanafîs divide the ascendants for purposes of succession into two classes, *viz.*, *true* and *false*. A *true* grandfather is an ascendant in whose line of relationship no female intervenes. For example, a

[1] The word "Son" here, and in the following passages, includes any lineal male descendant.

father's father is a *true* grandfather, whereas a mother's father is a *false* grandfather. A *true* grandmother is a female ancestor in whose line of relationship with the deceased no *false grandfather* intervenes, thus a mother's mother or a father's mother or father's father's mother are *true* grandmothers, whereas mother's father's mother is a *false* grandmother. None of these distinctions exists in the Shiah Law.]

3. Uterine brother (when only one, and no child, son's child, how low soever, father, or *true* grandfather), $\frac{1}{6}$.

When two or more and no child or son's child, how low soever, or father, or a *true* grandfather, $\frac{1}{3}$.

4. Husband (when the deceased leaves a child or son's child, how low soever), $\frac{1}{4}$.

Without them, $\frac{1}{2}$.

5. Wife (when the deceased has left no child, or son's child, how low soever), $\frac{1}{4}$.

A husband or widow co-existing with a daughter's child, (who is a *distant kindred*), takes his or her full share.

Co-existing with a child or son's child, how low soever, $\frac{1}{8}$.

[In consequence of the limited and qualified recognition of polygamy, or, more properly speaking, polygyny, by some of the schools, it sometimes happens among these Mussulmans that the deceased leaves him surviving more than one widow. In such a case, the widows will take the $\frac{1}{4}$ or $\frac{1}{8}$, as the case may be, between them.]

6. Daughter (when only one and no son, so as to render her a residuary), $\frac{1}{2}$.

Two or more (and no son), $\frac{2}{3}$.

7. Son's daughter (or son's son's daughter, how low soever) :—

When only one and no child or son's son, or other lineal male descendant, $\frac{1}{2}$.

When two or more and no child or son's son or other lineal male descendant, $\frac{2}{3}$.

When co-existing with one daughter and no son or son's son or other lineal male descendant, $(\frac{2}{3}-\frac{1}{2})=\frac{1}{6}$.

When there are two daughters, the son's daughters are excluded, unless there happen to be with them a lineal male descendant of the same or lower degree. The son's daughters or the daughters of any lineal male descendant are excluded by a son or by a lineal male descendant nearer in degree than themselves.

8. Mother (when co-existing with a child of the *propositus* or his or her son's child, how low soever, or two or more brothers and sisters, whether consanguine or uterine), $\frac{1}{6}$.

When not, $\frac{1}{3}$.

But $\frac{1}{3}$ of *remainder* after deducting husband's or wife's share, when with *father;* $\frac{1}{3}$ of whole when with *grandfather.*

9. A *true* grandmother how high soever (when not excluded by a nearer *true* female ancestor), $\frac{1}{6}$.

10. Full sister (when only one and no son or son's son how low soever, father, *true* grandfather, daughter, son's daughter, or brother), $\frac{1}{2}$.

When two or more and no such excluder, $\frac{2}{3}$.

11. Consanguine sister (when only one and no excluder as above or full sister), $\frac{1}{2}$.

When one and co-existing with one full sister, $\frac{1}{6}$.

When two or more and no such excluder, $\frac{2}{3}$.

When there are two full sisters, the consanguine sister takes nothing unless there is a consanguine brother with her.

12. *Uterine* sister takes like *uterine* brother.

These represent the sharers, persons whose shares are specified in the Koran, and with reference to whose shares therefore, there is, substantially, little or no difference between the Sunnis and the Shiahs.

Section II.—*Asabâh* or Residuaries.

Asabâh (*Agnates*) *or Residuaries.*—The residuaries are divided into three classes: (1) residuaries in their own right; (2) residuaries in another's right; and (3) residuaries together with another.

The first class includes all agnatic male relations, that is, those in whose line of relationship to the deceased no female enters—for if a female were to come in, the male would not be a residuary; he would belong to the category either of sharers or distant kindred. These are the *Asabâh proprio jure* (*Asabâh-be-nafsihî*).

1. Residuaries in their own right are divided into four sub-classes:—

(1) The "offspring" of the deceased, meaning thereby the deceased's sons or lineal male descendants;

(2) His "root," *viz.*, the ascendants, in other words, his father and *true* grandfather, how high soever;

(3) The "offspring" of his father, *viz.*, full brothers and consanguine brothers and their lineal male descendants;

(4) The "offspring" of the *true* grandfather, *how high soever*, in other words, lineal male descendants, however remote, of lineal male ascendants however removed.

It must be remarked that in the succession of the *Asabâh* proper, when the relations are of the same degree of affinity, preference is given to the strength of blood or consanguinity. For example, when the deceased leaves a full brother and a half-brother by the same father only, though the degree of affinity is the same, yet the tie of blood being stronger in the case of a full brother than in that of the half-brother preference is given to him. In the same way, the son of a full brother is preferred to the son of a half-brother on the father's side. So also, when there is with the brother's son a paternal uncle, the uncle has no interest in the inheritance. Lineal male descendants exclude all agnates in the ascending as well as collateral lines.

The residuaries in another's right are those females who become residuaries only when they co-exist with certain males, that is, when there happen to be males of the same degree or who would take as such, though of a lower degree.

These are four in number, *viz.* :—

(1) Daughters (with sons).

(2) Son's daughters (with a son's son or a male descendant still further removed in the direct line).

This applies to the daughters of all lineal male descendants however low. For example, when there is a son's son's daughter co-existing with a son's daughter, the latter takes her half (like the daughter of the deceased),

and the one-sixth goes to the son's son's daughter and so on. If there are two son's daughters, the son's son's daughter will take nothing unless she has a lineal male descendant of the same or lower degree co-existing such as a brother or nephew.

(3) The full sister (with her own or full brother).

(4) The sister by the same father, or, in other words, a consanguine sister (with her brother).

When the females are of the same degree as the males (or as in the case of son's daughters or son's son's daughters, how low soever, when they co-exist with lineal male descendants though of a lower degree), each female takes half the share of a male. For example, where there are two sons and three daughters or two brothers and three sisters, each daughter or sister as the case may be, will take one-seventh and each son or brother two-sevenths.

It must be remembered, however, that many males may, in certain contingencies, become residuaries, but it does not follow that in all cases their sisters would become residuaries *with* them. It is only when the female is a sharer herself that, instead of taking a share, she takes as a residuary when co-existing with a male residuary. For example, if a man die leaving behind him a wife, a paternal uncle, and an aunt, "be the latter by the same father and mother, or by the same father only," the aunt, not being a *sharer*, according to law, is not entitled to any share in the inheritance of her deceased nephew, and her brother (the uncle) takes the entire estate after allotment of the widow's share.

(1) Full sisters, with daughters or son's daughters.

(2) Consanguine sisters with daughters or son's daughters.

When there is one sister of the whole blood, and consanguine brothers and sisters, the full sister will take her half, and the residue will be divided among the half brothers and sisters in the proportion of two to one. When there are several full sisters they will take their two-thirds, and the remainder will be divided as above. When the deceased leaves only a full sister and a consanguine sister, they take a moiety and one-sixth respectively, and the residue is divided among them *pro rata*. When there are two or more full sisters and several consanguine sisters, but no (consanguine) half-brother, the full sisters take the whole, the consanguine sisters take nothing.

When there is one daughter or son's daughter with a full or consanguine sister, the daughter or son's daughter takes her moiety, and the remainder goes to the sister. When there are several daughters or son's daughters, they take two-thirds, and the residue appertains to the sister.

When there are several daughters and full sisters with son's daughters, the daughters and full sisters exhaust the inheritance.

If there are two daughters, a son's daughter, and a lineal male descendant such a son's son or a son's grandson, the two daughters take two-thirds between them; the son's son takes two-ninths being two-thirds of the residue, and the son's daughter takes the remaining one-ninth.

When the deceased leaves a daughter and several daughters of a pre-deceased son, the daughter takes her half, and the son's daughters one-sixth, and the residue is divided among the daughter and son's daughters *pro rata;* but if there are two daughters they take two-thirds and "there is nothing for the son's daughters," that is, when there is no male among the children of a son; but if there is a male, he makes the females (whether they be his sisters or cousins) residuaries with him, so that if there were two daughters or more, they would have two-thirds between them, and the remainder would pass to the children of the son, in the proportion of two parts to the males and one part to the females. The male may be of a lower degree still he would make them residuaries with him; so that the remainder would be between him and them in the same proportion, or two parts to each male, and one to each female.

When a person dies leaving behind him several relations who may be classed as residuaries of the different kinds indicated, preference is given to propinquity to the deceased, so that the residuary with another, when nearer to the deceased than the residuary in himself, would come first.

Thus, when a man has died leaving a daughter, a full sister, and the son of a half-brother by the father—one-half of the inheritance is given to the daughter and the other half to the sister, who is a residuary *with* the daughter and nearer to the deceased than the brother's son. In the same way, a sister by the same father and mother (co-existing with a daughter) is preferred to a brother by the

same father only, that is, the daughter will take her half share, and the remainder will be given to the full sister.

Section III.—Cognates or Uterine Relations.

Uterine Relations or Distant Kindred:—*When there are no sharers or residuaries,* the "uterine relations" succeed to the inheritance of the deceased according to the class to which they belong and to their respective "claims." A husband or a wife, though a sharer, does not exclude the "uterine relations" from taking a share in the estate of the deceased.

The "uterine relations" are divided into four classes, *viz.*:—

(1) The children of daughters or of son's daughters how soever low.

(2) Male ancestors in whose line of relationship to the deceased there occurs a female and therefore called "false grandfathers;" and the "false grandmothers."

(3) The daughters of full brothers and of half-brothers (by the same father only), and the children of half-brothers by the same mother only, and the children of all sisters how soever low.

(4) Paternal uncles by the mother, that is, the father's half-brothers by the same mother only and their children, paternal aunts and maternal uncles and aunts and their children; and the daughters of full paternal uncles and half paternal uncles by the father.

Among the individuals of the fourth class, if the sides are equal, preference is given to propinquity, but if the sides of consanguinity differ, then no regard is shown to

the strength of relations. Those who are related both by the father and mother, are preferred to those who are related by the father only; and they who are related by the father, are preferred to those, who are related by the mother only, whether they be males or females; and, if there be males and females and their relation be equal, then the male has the allotment of two females, for example, "if there be a paternal uncle and aunt, both by one mother, or a maternal uncle and aunt, both by the same father and mother, or by the same father or by the same mother only, and if the sides of their consanguinity be different, then no regard is shown to the strength of relation; as, if there be a paternal aunt by the same father and mother, and a maternal aunt by the same mother or a maternal aunt by the same father and mother, and a paternal aunt by the same mother only, then two-thirds go to the kindred of the father, for that is the father's share, and one-third to the kindred of the mother, for that is the mother's share; then what is allotted to each set is divided among them, as if the place of their relationship were the same." Thus a full paternal aunt excludes father's uterine brother and half sisters, but not mother's half brothers and half sisters; and a mother's brother or sister does not exclude father's uterine brother and half sister. Those of the father's side take two-third, while those related on the mother's side divide one-third among themselves.

The general order of succession is, according to their classification, the first class succeeding first, and so on.

Among the individuals of the various classes, succession is regulated by proximity to the deceased.

It should be noted here that the four classes enumerated above are not exhaustive. According to the most approved definition, all persons connected with the deceased through them are his "uterine relations."

In other words, the term includes all persons related to the deceased who do not come under the category of sharers or residuaries.[1]

If the claimants be equal in *sides* as well as in *degree*, then the child of a sharer or a residuary is preferred; but if the sides differ, the person related on the father's side is entitled to double the share given to the person related on the mother's side.

Of the individuals of the first class of uterine relations or distant kindred,—which comprises the children of daughters and the children of son's[2] daughters,—the *nearest of them in degree* to the deceased is the person preferably entitled to the succession.

Thus the daughter of a daughter will take in preference to the daughter of a son's daughter.

If the claimants be equal in degree as well as in side, that is, if all be related to the deceased in the second, third, or fourth degree, as the case may be,—in such a case, as already stated, the child of a sharer or a residuary is preferred to the child of an uterine relation, *e.g.*, the son's daughter's daughter will take in preference to daughter's daughter's son.

But if the sides differ, the person related on the father's

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[1] See *Abdul Serang* v. *Putee Bibi*, I.L.R., 29 Cal., 738.

[2] The word "son" here also includes any lineal male descendant.

side is entitled to two-thirds and the person related on the mother's side is entitled to one-third.

But if their degrees be equal and there be not among them the child of a sharer or a residuary, or if they all be related through a sharer or a residuary, then—according to Imâm Mohammed (whose opinion is followed in India by the Hanafî sect)—the shares would be regulated by the number and sex of the persons existing at the time the inheritance opens, provided the persons through whom the claimants are connected with the deceased are of the same sex, or, as it is technically said, "provided the sex of the roots agree." (So far Abû Yusuf coincides with him.)

But if "the sex of the roots" differ, or, in other words, if the persons through whom the claimants happen to be connected with the deceased differ in their sex, then, according to Imâm Mohammed, whose opinion on this point is followed by the Indian Sunnis, the shares are not regulated by the number and sex of the claimants, but "by the roots," in other words, they take *per stirpes*.

According to the rule of Abû Yusuf which, being simpler and more intelligible, is followed throughout Western Asia, in every case where the claimants are of an equal degree and there is not among them the child of a sharer or a residuary the property is divided with reference to the sex and number of the claimants.

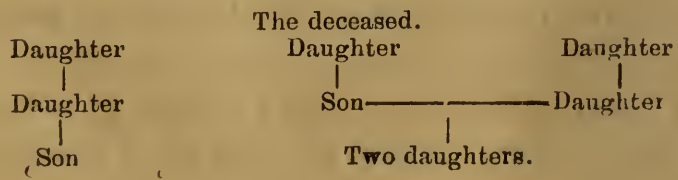
One or two examples may be of assistance to the student in understanding these divergent views:— Suppose a man dies leaving five descendants, three of whom are females and two males, *viz.*, *two* daughters of a daughter's son's daughter, *one* daughter of a daughter's daughter's son,

and *two* sons of a daughter's daughter's daughter, as in the following table :—

Daughter	Daughter	Daughter
|	|	|
Daughter	Daughter	Son
|	|	|
Daughter	Son	Daughter
|	|	|
2 sons	Daughter	2 Daughters.

According to Abû Yusuf, the property of the deceased will be divided into seven shares, out of which two shares will be given to each of the males and one share to each of the females. According to the other disciple of Abû Hanîfa, the property will be divided into twenty-eight shares, out of which 8 shares will be given to each of the daughters of the daughter's son's daughter, 6 shares to the daughter of the daughter's daughter's son, and 3 shares to each of the sons of the daughter's daughter's daughter. The reason of this division is thus stated. The two daughters on the right-hand side carried on to the second line stand as four daughters, the single daughters in the middle carried to the second line would stand as one daughter, and the two sons merely as two daughters. That would give seven shares to be divided according to the position of the ancestor in the second line, which would give $\frac{4}{7}$ to the son in the second line, and $\frac{3}{7}$ between the two daughters in the same line.

Another example is as follows :—



According to Abû Yusuf the male descendant takes one-third, whilst the female descendants take two-thirds between them.

According to Mohammed the estate will be divided into 28 parts, out of which the females take 22 shares (16 in right of their father and 6 in right of their mother), whilst the male descendant takes only 6 shares in right of his mother.

Walâ.—Besides the heirs specified above, the Sunni Law recognises the right of succession based on the relationship of *walâ*. Among the Hanafîs, *walâ* is of two descriptions, viz., *walâ-ul-itq*, "the right of inheritance acquired by emancipation," and the *walâ-ul-mawâlât*, "the right of inheritance by clientage." The Shiahs recognise three kinds of *walâ*, two of which are analogous to those recognised by the Sunnis; but whilst the Shiahs postpone the right of succession of the emancipator until after the blood relations are all exhausted, the Sunnis give the preference to the emancipator over the "uterine relations" of the deceased. For example, if a man were to enfranchise his slave, and that slave were to die subsequently, leaving certain heirs belonging to the class of "uterine relations," the emancipator would exclude such relations under the Sunni Law. "By the *walâ* of manumission," says the *Hedâya*, "*asûbat* is established; in other words, when a person emancipates his slave he is *asabâh* to such slave, and is entitled to inherit of him in preference to his maternal uncles and aunts or other uterine kindred."

The emancipator is, accordingly, styled in Sunni Law "a residuary for special cause." In the absence of the

manumittor, his male, but not the female, residuary heir succeed to the deceased freedman. 'Females succeed, however, when they themselves have manumitted the slave. If the deceased freedman leave no sharer or residuary by blood, his entire estate goes to the *asabâh* by *walâ* (the emancipator or his male residuary heirs), to the absolute exclusion of the deceased's uterine relations. If he leave a sharer, then the specified share is allotted to such sharer, and the residue goes to the residuary by *walâ*; but if he leave a residuary by blood, then the latter takes nothing.

But in the succession of the manumittor and his male residuaries to the emancipated slave, a variation is made by the Sunnis in the recognised order of succession. For example, in ordinary cases, when a man dies leaving behind him a son and a father, the father takes his specified share, *viz.*, one-sixth, and the son takes the residue; but if a freedman were to die leaving behind no *asabâh* by blood, but only his manumittor's son and father, the son of the emancipator would take the whole inheritance to the exclusion of the father. So also in the case of the manumittor's son co-existing with a grandfather. The general principle is that in the succession of "residuaries for special cause," the nearest takes the whole in preference to the one more remote (as an agnate).

The subject of *walâ*, however, has now only an antiquarian interest. Section 3 of Act V of 1843 has removed all bar to the succession of the natural heirs of an emancipated slave to his or her inheritance. And in the case of *Sayad Mir Ujmudin Khan* v. *Zia-ul Nissa Begam*,[1]

[1] L.R., 6 I.A., p. 137.

the Privy Council declared in effect, that the right of inheritance created by the relationship of *walâ* to the exclusion of the emancipated slave's natural heirs was done away with by that Act. The result of that statute is that the distant kindred (cognates) of a person, who was a slave at one time but was emancipated afterwards, take their natural place in the order of succession.

When the deceased leaves no natural relation, but leaves him or her surviving a husband or a widow, as the case may be, such husband or widow takes the entire inheritance.

In the absence of the heirs mentioned above, the succession devolves upon the patron of the deceased; in his absence upon the heir by acknowledgment. An heir by acknowledgment is one in respect of whom the deceased (both the acknowledgor and acknowledged being persons of unknown descent) has admitted a tie of blood. For example, if two persons of unknown parentage call themselves brothers, and one of them dies without leaving any *known* heirs, the other person would be entitled to the deceased's inheritance. Then comes the universal legatee. And lastly, the Public Treasury (*for the benefit of all the Mussulmans*).

Section IV.—The Doctrine of *Return*.

When there are sharers and no residuaries, the residue of the property after the allotment of the shares is divided among the sharers by the principle of *Return* in the proportion of their shares.

The early lawyers were of opinion that a husband or a wife was not entitled to take by *Return*, but later jurists

have held that when the deceased leaves no other heir, belonging either to the category of residuaries or distant kindred, the husband or widow would take by *Return*. And this rule has been recognised and enforced by the British Indian Courts.

The persons to whom there may be a *Return* are ordinarily-speaking eight in number: (1) mother, (2) grandmother, (3) daughter, (4) son's daughter, (5) full sister, (6) half-sister by the father, (7) half-brother, and (8) sister, by the mother. And a *Return* may take place to one, two, or three classes at the same time. But no more than three can take by *Return* at one and the same time.

The residue after allotment of shares is apportioned among the parties indicated, in proportion to their shares, *e.g.*—

When there is a grandmother with a sister by the same mother of the deceased, the shares are $\frac{1}{6}$ each, therefore the residue is divided among them equally.

When there is a daughter with the mother, the shares are $\frac{1}{2}$ and $\frac{1}{6}$, therefore the residue is divided among them in proportion to their shares, which will be $\frac{1}{12}$ and $\frac{3}{12}$.

When there are two wives, a mother, and three daughters, the wives take between them $\frac{1}{8}$.

Mother, $\frac{1}{5}$ of $\frac{7}{8} = \frac{7}{40}$

3 daughters, $\frac{4}{5}$ of $\frac{7}{8} = \frac{7}{10}$, each $= \frac{7}{30}$

L.C.D. = 240.

$\therefore$ each wife = 15, 2 wives = 30
Mother = 42
Each daughter = 56, 3 daughters = 168
240

Or—Mother : daughter $= \frac{1}{6} : \frac{1}{2} = 1 : 3.$

Mother — $\left(\frac{1}{6} + \frac{1}{12} = \frac{2+1}{12}\right) = \frac{1}{4}$

Daughter—$\left(\frac{1}{2} + \frac{3}{12} = \frac{6+3}{12}\right) = \frac{3}{4}$

Or—Wife, mother, and daughter.

Wife $= \frac{1}{8}$.

Mother : daughter $= \frac{1}{6} : \frac{1}{2} = 1 : 3.$

Mother $= \frac{1}{4}$ of $\frac{7}{8} = \frac{7}{32}$

Daughter $= \frac{3}{4}$ of $\frac{7}{8} = \frac{21}{32}$

Wife, 4; mother, 7; daughter 21.

Or—2 wives, one mother, and 3 daughters.

2 wives $= \frac{1}{8}$, 1 wife $= \frac{1}{16}$.

Mother : 3 daughters $= \frac{1}{6} : \frac{2}{3} = 1 : 4.$

When there happen to be a mother, a daughter, and son's daughter, the shares are respectively $\frac{1}{6}$, $\frac{1}{2}$, and $\frac{1}{6} = \frac{5}{6}$; the residue is divided then among them in pro-

portion to their shares, that is, $\frac{1}{30}$ to the mother, $\frac{1}{30}$ to the son's daughter, and $\frac{3}{30}$ to the daughter.

Or—Mother and son's daughter together take $\frac{2}{6}$, daughter $= \frac{3}{6}$.

$\therefore$ Mother and son's daughter : daughter $= \frac{2}{6} : \frac{3}{6} =$ 2 : 3.

$\therefore$ Daughter takes $\frac{3}{5}$.

Mother and son's daughter $\frac{2}{5}$. And so when there is a daughter with a son's daughter.

Where a deceased leaves a certain number of heirs and one of them dies before distribution leaving heirs, such heirs would take under both the deceased, if they are heirs of both; or, under the latter, if not entitled to succeed to the inheritance of the first deceased. For example, a man dies leaving a son, a daughter and a half-brother by the father. In this case, the son excludes the half-brother; but before distribution the son dies, leaving only the sister and his half-paternal uncle as his heirs. In this case the son's $\frac{2}{3}$ is divided equally between his sister and his uncle the former getting half of $\frac{2}{3}$, *viz.* $\frac{1}{3}$, and the latter the remaining $\frac{1}{3}$. This is called taking a "double inheritance."

Section V.—The Doctrine of Increase.

It sometimes happens in practice that when there are several sharers co-existing, their fractional shares when added up amount to a great deal more than the integral quantity. In order to meet the difficulty thus arising, the Sunni lawyers make a proportionate abatement in *all* the shares by increasing the common divisor. This is called *Aul*. "Increase" or *Aul* is thus a technical expression used by Sunni lawyers to signify a proportionate increase in the common divisor for the purpose of yielding the requisite number of shares. For example, if a woman leave behind her a husband, two daughters, and a mother, their respective shares would be one-fourth, two-thirds, and one-sixth. The common divisor in this case is twelve, which represents the shares into which the estate will have to be divided, three being the husband's share, eight the daughter's, and two the mother's. But three, two, and eight make thirteen. The Sunnis accordingly, in order to give the exact number of shares to each heir divide the property into thirteen shares.

Among the Shiahs, on the contrary, when they find that the property falls short in distribution of all the appointed shares, the deficiency falls upon the heir or heirs whose share or right is liable to fluctuation or variation. For example, in the above case the mother and husband would get, among the Shiahs, their full shares, without any abatement, and the remainder, *viz.*, seven-twelfths, would be given to the daughters in equal proportions.

Section VI.—Posthumous Children, etc.

When a person dies leaving a widow, she is prohibited from marrying before the expiration of four months and ten days. This is called the *iddat* or probation of widowhood, and is prescribed for discovering whether she is *enceinte* or not. If she is, her probation will not terminate until she is delivered. If a child is born within the ordinary period of gestation,[1] it would succeed to its father. Where a child is born after the decease of any *other* relation to whose inheritance it would have been entitled had it been in existence at the time of such relation's death, it will succeed only if born within six months from such death.

Persons dying in a sudden calamity are supposed to have died together, so that they do not inherit to each other, but the property of each goes to his or her respective heirs.

Under the old Hanafî Law, missing persons were supposed to be alive for 90 years. But the more reasonable principle of the Mâlikî Law is now in force among the Hanafîs, *viz.*, that if a person be unheard of for four years he is to be presumed to be dead. Among the Shiahs the lapse of ten years gives rise to that presumption, whilst among the Shâfeïs the recognised period is seven years, which is the same as in the Indian Evidence Act.

Section 107 of the Indian Evidence Act runs as follows:—"When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years,

[1] See *post*, p. 50.

the burden of proving that he is dead is on the person who affirms it."

Section 108 then provides "that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to] the person who affirms it."

It could hardly have been intended by this proviso to vary the substantive rules of the different schools of Mahommedan Law. For example, if a Hanafî wife, whose husband has been missing for four years, were to re-marry after the lapse of that period, it would be impossible to hold, in my opinion, that such marriage is invalid owing to the provisions of s. 108.

CHAPTER III.

THE SHIAH LAW OF SUCCESSION.

THE great distinction between the Shiah and the Sunni Law of Inheritance consists in the doctrine of agnacy. The Shiahs repudiate *in toto* the doctrine of *Taasîb* or agnacy; consequently the paternal relations of the male sex, or what are called *Asabâh proper* in Sunni Jurisprudence, have no especial privilege, nor are they preferred to the relations connected with the deceased through females.

According to the Shiahs, there are two causes which give rise to the right of inheritance: (1) *nasab* (consanguinity), and (2) *sabab* (special cause). Consanguinity implies simply the tie of blood. All relations therefore connected with the deceased by the tie of blood are entitled to share in his inheritance unless excluded by the operation of the rules which we shall presently define.

The relations who are entitled to succession by virtue of consanguinity (*nasab*) are divided into three classes or groups, and each class again into two sections. The members belonging to the first class of heirs exclude from succession those belonging to the second, whilst these, in their turn, exclude all members belonging to the third class.

But the heirs of the two sections of each class succeed together. For example—

(*a*) The first class of heirs, entitled by *nasab* to inherit from the deceased, consists (1) of the ascendants of the

first degree, *viz.*, the parents, and (2) of the children and their offspring, including all descendants of the deceased.

(*b*) The second class consists (1) of the ascendants of all degrees, and (2) brothers and sisters and their descendants.

(*c*) The third class consists of the collaterals (1) on the father's, and (2) on the mother's sides, being descendants however low in the collateral lines of the ascendants however high, such as uncles, aunts, grand-uncles, grand-aunts, etc., however high, and their descendants however low.

Whilst there is a single member of the first class existing, those who belong to the second and the third class are absolutely excluded from the succession. In the same way, if there be any relation of the second class co-existing with relations of the third class, the latter take nothing. But the members of the two sections of each class succeed together. For example, parents take a share in the inheritance of the deceased with the children of the deceased; grand-parents with the brothers and sisters; maternal uncles and aunts with the paternal uncles and aunts. A child or child's child entirely excludes the brothers and sisters and their descendants. And so brothers and sisters and their descendants exclude the uncles and aunts, but they inherit together with ascendants of the higher degree.

When a Sunni Mussulman dies, leaving behind him a daughter's daughter with a brother's son, the brother's son, as an *Asabâh*, takes the entire inheritance to the exclusion of the deceased's own grandchild. Among the Shiahs, the grand-daughter of the deceased, as a lineal descendant, takes the whole property to the exclusion of the brother's son.

When a Sunni Mussulman dies, leaving behind him a daughter and a brother, the daughter takes her specified share, *viz.*, a moiety, and the rest goes to the brother as a Residuary or *Asabâh*. Under the Shiah Law, she takes the whole, one-half as her specified share, and the other by the doctrine of *Return*.

The right of succession for special cause (*sabab*) is divided under two heads :—

(1) The right of inheritance by virtue of matrimony (*zoujiyat*) ; and

(2) The right of inheritance by virtue of *walâ* or special relationship.

The right of inheritance by virtue of *zoujiyat* appertains to the individual heir under all circumstances. The husband or the wife, accordingly, is never excluded from succession. If the deceased leave behind him a child and a widow, the latter takes her specified share, and the residue goes to the child. In the same way a wife co-existing with the parents or grand-parents or brothers and sisters of the deceased is entitled to her specific share before the property is divided among the heirs, who succeed by virtue of *nasab*.

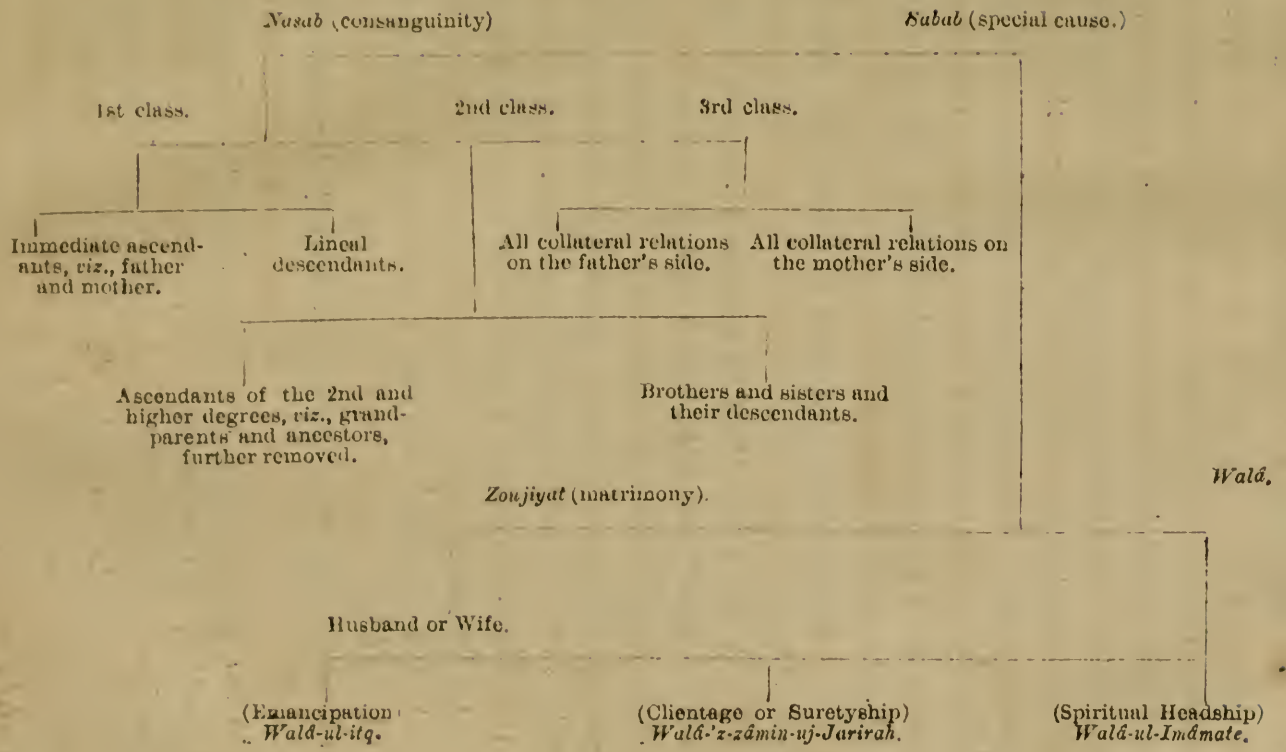
(2) The right of inheritance by *walâ* is divided under three heads, *viz.* :—

(*a*) *Walâ-ul-itq*, "The right of inheritance possessed by the emancipator."

(*b*) *Walâ-'-z-zâmin-uj-jarîrah*, "The right of inheritance for obligation of delicts committed by the deceased."

(*c*) *Walâ-ul-Imâmate*, "The right of inheritance possessed by the Imâm by virtue of the *walâ* of Imâmate or spiritual headship."

Synoptical Table of Shiah Inheritance.



Under the Shiah Law, heirs, to whichever class they may belong among the consanguineous relations, are divided into three categories in respect of the right which entitles them to participate in the inheritance of the deceased, *viz.*: (1) Those whose heritable right is acquired by virtue of the shares assigned to them in the Koran, and who are, therefore, designated *zû-farz*; (2) those who inherit sometimes as *zû-farz* and sometimes by virtue of their relationship (*karâbat*) to the deceased; (3) those who take only by virtue of their relationship, and are, therefore called the *zû-karâbat*.

The heirs who are entitled to appointed shares (the *zû-farz*) are—

(1) A daughter or daughters, when without (the deceased's) father, and her own brother or brothers.

(2) A full sister or sisters, or a consanguine sister or sisters existing without a grandfather, and brother or brothers of the same degree as themselves.

(3) The father with a child or children of the deceased.

(4) The mother.

(5) The husband, or the

(6) Wife.

(7) The person or persons related by the same mother only.

When there is only one heir, whether a *zû-farz* or a *zû-karâbat*, or one entitled by virtue of the special relationship of *sabab*, such heir takes the entire inheritance.

For example, an only daughter takes her appointed share, *viz.*, one-half, and the remainder goes to her by *Return*

An only son takes the entire inheritance by right of *karâbat*, there being no specific share assigned to him by the law.

When the deceased leaves behind him or her no relation excepting a husband or a wife, who is entitled to succeed by virtue of the *sabab-i-zoujiyat* (matrimony), he or she, as the case may be, takes the entire inheritance, first his or her specific share, and the remainder by *Return* (*radd*).

When there are male and female heirs of the same degree in the order of relationship, belonging to the same class, and connected equally by the tie of blood, the male takes double the share of a female. For example, a son takes double the share of a daughter; a grandson double the share of a grand-daughter, and so on. In the case, however, of heirs related on the mother's side alone, an exception is made to the above rule. For example, uterine brothers and sisters divide the share allotted to them, *viz.*, one-third, equally without distinction of sex.

When there are two or more heirs who inherit, not as sharers, but by *karâbat* or *sabab*, they take the estate in proportion to their respective rights. For example, when there are two sons, they divide the estate equally; when there are only a son and a daughter, the son takes two-thirds and the daughter one-third.

When there are several heirs, some connected with the deceased through the father and others through the mother, then each party takes the portion of the person through whom they are related. For example, when there are paternal, as well as maternal, uncles and aunts then those connected on the father's side take two-thirds, and one-third

goes to those who are connected on the mother's side. When the individuals so related to the deceased are themselves of different descriptions, then the share allotted to the group is divided according to their sex or respective individual rights. For example, if the deceased leave behind him several paternal uncles and aunts, they take two-thirds among them as a body, but the two-thirds is divided among them in the proportion of two to one, so as to give the males double the share of the females.

The children of consanguineous heirs, if not in any way excluded, take the place of their deceased or disqualified parents, and receive proportionately the shares of their parents. For example, if a man die, leaving the children of a son and the children of a daughter, the first take two-thirds of the estate and divide it proportionately among themselves according to their respective rights, whilst the children of the daughter take one-third (to which their mother was entitled) and divide it in the same way.

When there are two or more heirs, one or more of whom are entitled as *zû-farz* and the others as *zû-karâbat*, the *zû-farz* take their respective shares before the residue is divided among the latter.

When there are several relations some of the full and others of the half-blood, those connected on the mother's side take only one-third, which is divided among them equally without distinction of sex, and the residue is divided among the relations of the full blood in the usual proportions; relations on the father's side being entirely excluded. For example, if the deceased leave some full brothers and sisters and some half-brothers and sisters, both on the father's

and the mother's side, the uterine brothers and sisters take one-third of the inheritance among them, and divide it equally without distinction of sex. If there be only one such uterine brother or sister, he or she takes one-sixth. The residue is then divided among the full brothers and sisters in the proportion of two to one, the brothers of the half-blood on the father's side being entirely excluded. It is only in default of relations of the full blood that those connected on the father's side participate in the inheritance. For example, if a person die leaving a brother of the half-blood on the father's side, and a sister by the same father and mother, the latter would exclude the brother *in toto*. This rule applies to all such cases.

The husband or widow is never excluded from succession. In ancient times the widow did not take by *Return*, but modern lawyers hold, and it has been decided, that she takes by *Return* in the absence of all natural heirs.

When there are relations connected with the deceased on the father's side only, and others who are connected on the mother's side only, and both sets of relations are equal in degree and class, the two sets take their respective shares and divide the residue among themselves *pro ratâ*. For example, if the deceased leave behind him a sister of the half-blood on the father's side and a sister of the half-blood on the mother's side, both of them take their respective shares, *viz.*, one-half and one-sixth; and the remainder, *viz.*, one-third, is divided among them in the ratio of three to one.

As far as the shares are concerned, they are six in number, *viz.*, a moiety, a fourth, an eighth, a third, two-thirds and one-sixth.

(1) A moiety is taken by—

(*a*) The husband, when there are no children.

(*b*) The full sister, in default of other heirs.

(*c*) The daughter when only one.

(2) The fourth is taken by—

(*a*) The husband when with children.

(*b*) The wife, when there are no children.

(3) The eighth is taken by the widow with children or children's children, how low soever.

(4) The third is taken by—

(*a*) The uterine brothers and sisters, when two or more in number.

(*b*) The mother, when the deceased has left no children, or two or more brothers or one brother and two sisters.

(5) Two-thirds are taken by—

(*a*) Two or more daughters, when there are no son or sons.

(*b*) Two or more full sisters, when there are no full brothers or brothers of the half-blood on the father's side only.

(6) A sixth share is taken by—

(*a*) The father and the mother, when the deceased has left lineal descendants.

(*b*) The mother, when there exist with her two or more brothers of the full blood or one brother and several sisters of the full blood (or by the same father only, the father himself being in existence).

(*c*) The single child by the same mother only, whether such child be male or female, *viz.*, a uterine sister or brother.

Under the Shiah Law, a childless widow or one who has no issue surviving at the time of her husband's death is not entitled to a share in immovable property or lands; but only to a share in *movable* property, and in the value of houses, buildings, &c.

CHAPTER IV.

EXCLUSION FROM INHERITANCE.

UNDER the Mussulman Law several causes debar a person from succeeding to the estate of the *propositus*, notwithstanding that he may stand to the deceased in the relation of an inheriting relative.

(1) The first is *Kufr* (infidelity). *Kufr* means the denial of the unity of God (*wahdâniat*), and of Mohammed's Messengership (*risâlat*), the two cardinal principles on which Islâm is founded. Every person who acknowledges the Divine Unity and the Messengership of Mohammed is regarded as within the pale of Islâm; nothing more is required.[1] Those, however, who "deny" these cardinal principles are considered beyond the benefit of its rules. Accordingly, when a person dies leaving an heir who by birth or apostacy is a "denier," *i.e.*, repudiates God's unity and Mohammed's ministry, such heir would be excluded from succession in preference to another who does accept those doctrines.[2]

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[1] See *Appendix IV.*

[2] A believer in God or a theist, who, although he does not call himself a Mussulman, yet accepts Mohammed as one of the veritable "Messengers of God," can hardly be designated a *Kâfir*. Many Moslem divines regarded Raja Ram Mohun Roy as a Moslem—certainly not a *Kâfir*. Islâm depends on the acceptance of the two doctrines mentioned in the text. The recognition of sectarian dogmas is a matter of detail. And, hence, whilst the ultra-Sunni regards a Shiah as a

The Indian Act, XXI of 1850, has made a variation in the Mahommedan Law of Inheritance. The principal by which "deniers" or "infidels" were excluded from the inheritance applied equally to those who were born in a different faith and those who had abjured Islâm. For example, an apostate from Islâm and an original non-Moslem came equally within the purview of this rule, so that, if a deceased Moslem left behind him three heirs, one of whom was a non-Moslem, the other an apostate, and the third a Moslem, the first two, under the Mahommedan Law, would be absolutely excluded from the succession, and the inheritance would go entirely to the Moslem heir (though he may be remotest of all of them in proximity to the deceased). The change effected by Act XXI of 1850 is most important. This Act consists of only one section, but its operation has, in many cases, had the effect of entirely diverting the course of succession from the channel into which it would have otherwise run. It enacts that "so much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights of property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."

Moslem, he does not consider him a *Momin* (one having *Imán* or *faith* and *vice versâ*, *Imán*, which originally meant a belief in the cardinal principles, is now applied to the acceptance of sectarian dogmas.

The effect of this enactment has been to do away with the provisions of the Mahommedan Law by which *apostates* were excluded from the inheritance of deceased Moslems. But the prohibition against the succession of original non-Moslems remains intact. So that, if an apostate were to die, leaving children brought up in his or her own creed, they would have no right of succession to the inheritance of their Moslem relations, though had their apostate parent been alive, he or she would have been entitled under the Act to succeed.

(2) Another cause which excludes from inheritance is homicide. Under the Sunni Law, if one person were to kill another either intentionally or accidentally, he would be excluded from inheriting from the person killed. Under the Shiah Law, the homicide must be *intentional* and *unjustifiable* to be a bar to succession.

(3) Slavery is a bar to succession under the Shiah as well as the Sunni Law.

If a person should die, leaving one heir free and another a slave, the whole inheritance would go to the one who is free, though the other may be nearer to the deceased.

If the slave has a child who is free, it would inherit in preference to its parents.

(4) Illegitimacy is also a bar to succession.[1]

The Mahommedan Law does not recognise any physical defect as forming an impediment to succession, and consequently a person who happens to be insane is not excluded from inheritance.[2] Similarly, want of chastity in a daughter,

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[1] See *post*, p. 50, and Appendix III.

[2] *Meher Ali* v. *Amani*, 2 B.L.R., A.C., 306, S.C., 11 W.R., 262.

before or after the death of her father, or whether before or after her marriage, is no bar to succession.[1] Nor does a widow lose her right to a share in her husband's estate by reason of unchastity in her husband's lifetime.

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[1] *Noronarain Roy* v. *Nomalchand Neojy*, 6 W.R., 303.

The Law about Legitimacy - article - 47
Marriage with wife's Sister when previous marriage with
Sister, whether invalid or void - children of such marri
if legitimate - 35 N 132

PART II.

The Law Relating to Status.

CHAPTER I.

THE STATUS OF LEGITIMACY.

SECTION I.—GENERAL OBSERVATIONS.

UNDER the Mahommedan, as in all civilised systems of law, the "child follows the bed," that is, the paternity of a child born in lawful wedlock is presumed to be in the husband of the mother without any acknowledgment or affirmation of parentage on his part, and such child follows the status of the father.

According to all the schools the shortest period of gestation is six months. But there is great difference as to the maximum. The Sunni legists hold two years to be the longest period. The Shiahs consider ten months as the maximum limit, which in exceptional cases may extend to twelve months.

In Algeria, the Sunni doctors have adopted ten months as the longest period of gestation, and it may be regarded as furnishing the modern rule.

According to the Sunni schools, where a child is born six months from the date of marriage, and within ten

months after dissolution of the marital contract, either by the death of the husband or divorce, a simple denial of paternity on the part of the husband would not take away the status of legitimacy from the child.

A child, therefore, born with the period indicated is affiliated without any express acknowledgment on the part of the father. But a husband can disclaim a child born in wedlock and within the period recognised by law if cohabitation was impossible, whether the impossibility arose from disease, physical incapacity, or want of access.

But this right of disavowal is a terminable right. It ceases on the occurrence of certain contingencies which the law always keeps in view.

If the father has taken part in the customary ceremonies which in a Mussulman family attend a birth, or has, by his conduct, led people to believe that he considered the child his legitimate offspring, or has accepted their formal congratulations, then his right to deny its legitimacy falls to the ground.

In case of a disclaimer the wife has the right of challenging the husband to establish the charge of infidelity formally before the Judge. Such a proceeding is called *laân* in Mahommedan Law.[1]

Under the English Law, a child born in wedlock is legitimate, though conception may have taken place before the actual marriage. The Mahommedan Law, on the contrary, insists that conception, in order to render the child legitimate, should take place after the marriage actual or

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[1] See *post*, p. 56.

semblable. The Shiah Law goes further than the Sunni Law and requires that the birth of the child should be six months from the *consummation* of the marriage; whilst the latter is satisfied if the birth takes place six months from the *marriage*.[1]

In *Ahmad Hossain Khan* v. *Hyder Hossain Khan*,[2] the Judicial Committee of the Privy Council expressly laid down the principle that under the Mahommedan Law "the presumption of legitimacy from marriage follows the bed and is not antedated by relationship."

The presumption of legitimacy is so strong in the Mahommedan system that, according to the *Fatâwa-i-Alamgiri*, "only the offspring of a connection where the man has no right or *semblance* of right in the woman, either by marriage or by the relationship of master and slave, is a *walad-uz-zina* or a 'child of fornication.'" As regards the children born of slaves, the Mahommedan system is far more humane than any other older system. In the Southern States of North America, until the abolition of slavery, the child of a slave-woman, begotten by her master, was always a slave and could be and was, in fact, sold as a part of his property.

According to Abû Hanîfa, legitimacy is established by a valid marriage or a *semblable* contract of marriage whether the connection be radically illegal or not, and whether the parties be aware of the illegality or not. Abû Yusuf and Mohammed differ from him, and their opinion, which is given in this work, is recognised as law by the Hanafîs.

[1] But consider the provisions of s. 112 of the Evidence Act.

[2] 8 Moo. I.A., 132.

According to them, *nasab* is established (1) by a *valid* marriage, (2) by an *invalid* marriage, and (3) by the status of slavery. A marriage without witnesses, a marriage with an idolatress or fire-worshipper or with the wife's sister, etc., are regarded as invalid marriages.

There is great difference between a marriage which is void *ab initio* (*bâtil*) and one which is *invalid* (*fâsid*). If a man were to contract a marriage with a woman related to him within the prohibited degrees, the marriage would be void *ab initio*. Under the Hanafî Law, the children of such an union would not have the status of legitimacy, however unknowingly the marriage might have been contracted, unless there has been *ghurûr* or *deception* on one side or the other. For example, if a man were to marry a woman related to him within the prohibited degrees, on the representation that she was a stranger, and the marriage was consummated, the issue of such an union would be legitimate.

But it is different in the case of an invalid marriage. An invalid marriage is one where the parties do not labour under an inherent incapacity or absolute bar, or where the disability is such as can be removed at any time. For example, if a man were to marry two sisters, the second marriage is only invalid, for it might at any time be validated by the death or divorce of the first wife. So, if a man married a non-scriptural woman,[1] the marriage is only invalid, for she might at any time become a

[1] A woman not belonging to the revealed faiths, in other words, an idolatress; see Appendix IV.

Moslem, Christian or Jew. The issue of such unions are legitimate.[1]

So also, if a Moslemah were to marry a non-Moslem, according to the *Muntaka*, the marriage would be only invalid, for the unlawfulness is founded on the accident of the man being an "unbeliever," which may cease at any time. The issue of such marriage would, therefore, be legitimate.

"An invalid marriage," says the *Fatâwa-i-Alamgiri*, "is like a valid marriage in some of its effects, one of which is the establishment of parentage."

In *Azizunnissa Khatoon* v. *Karimunnissa Khatoon*,[2] the learned Judges have, it is respectfully submitted, under some misconception of the Mahommedan Law, held that where a man marries two sisters, the children of the second union are illegitimate. This enunciation which is opposed to the recognised rule, is evidently due to mixing up two questions, *viz.*, *the title of the second wife to dower* and *the status of the children born of her*. There is no question that she is not entitled to dower; but there is equally no question that the children are legitimate.

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[1] In view of this recognised principle, it seems to me that in the case of *Abdul Razak* v. *Aga Mahomed Jaffer Bindanim* (I.L.R., 21 Cal., 666), the real question for determination was missed both in the Recorder's Court as well as before the Judicial Committee, for if there was a *de facto* marriage, the prior conversion of the woman, so far as the legitimacy of the child was concerned, was immaterial. As regards conversion to Mahommedanism, also, there seems to have been some misapprehension; for, all that is required under the Mahommedan Law is *profession* and not *conviction*.

[2] I.L.R., 23 Cal., 130.

Though the issue of an invalid marriage are legitimate and have a right to the inheritance of the father, the mother has no such right. Again, an invalid marriage has no legal effect before consummation; so that, if the parties are separated by the Judge before consummation, the woman has no right to dower; but after consummation she is entitled to her proper dower or the specified dower, whichever is less. There is no divorce in such a marriage, but after consummation the husband may relinquish his marital right, provided it is done in express terms. The woman is not bound to observe the *iddat* in an invalid marriage.

According to the Shiah jurists, however, legitimacy is established by a valid marriage or by a *semblable* contract of marriage. If a man should enter in *good faith* into a contract of marriage which turns out to be invalid, the offspring of such marriage would be legitimate in the eye of the law. Similarly, *nasab* would be established though the union was *ab initio* null and void. For example, if a man married a woman who was forbidden to him, or with whom marriage was unlawful, either radically, that is, from the relationship of blood existing between the parties, or by some incidental circumstance—such as fosterage, matrimonial affinity, or any other cause,—the issue of such an union would be legitimate, if the marriage was contracted in error or the parties were not aware of the *hurmat* (illegality). If a man married by a pure mistake a woman within the prohibited degrees of consanguinity, such marriage would be radically illegal, but the issue of the union would not be illegitimate.

Under the Sunni Law, an illegitimate child "owns a *nasab*" to its mother and the mother's relations and can inherit from them, and they can inherit from him or her. Under the Shiah Law, "a child of fornication" (*walad-uz-zina*) owns no descent to either of its parents. It is regarded as *nullus filius*, "so neither the man who has unlawfully begotten, nor the woman who has unlawfully borne, the child, nor any of their relations, can inherit from such child, nor has the child any title to inherit from them."

But when a child is bastardised by a judicial proceeding (which is known as a proceeding by *laân* or imprecation, when the parties are put on their oaths), it inherits from its mother and maternal relations, and *vice versâ*. Such a child is called *walad-ul-mulâinah*. As regards the status of such a child there is an agreement between the Sunnis and the Shiahs.

When the parties are married, and the marriage is a matter of notoriety and capable of distinct proof, any dispute as to the status of the children resolves itself into a mere question, whether the children were conceived and born in lawful wedlock or not. But there may be cases in which the marriage is not capable of being easily proved. It may have been contracted in a distant country or under circumstances which preclude the possibility of securing documentary or oral testimony as to the factum of the marriage. In these cases, the Mahommedan Law presumes a legal marriage from continued cohabitation and the acknowledged position of the parties as husband and wife, provided there is no insurmountable obstacle to such a presumption, and provided the relationship existing between

the parties was not "a mere casual concubinage," but was permanent in its character, justifying the inference that they were lawfully married.[1]

Section II.—Filiation by Acknowledgment.

The Mussulman Law does not recognise the validity of any mode of filiation where the parentage of the person adopted is known to belong to a person other than the adopting father.

The only form of filiation which is recognised by the Mahommedan Law is the one which is created by *ikrâr* or "acknowledgment." Under the Sunni Law, the father alone has the right to establish the relationship. Neither the mother nor any other relation has any right to acknowledge the status of sonship to another.

Such acknowledgment may be either expressed or implied; it may be made in express terms or may be implied from the father's conduct towards, and his continued treatment of, the child as his own child.[2] But in order to render the acknowledgment valid and effectual in law three conditions must be fulfilled, *viz.*—

(1) The acknowledgor and the acknowledged must be of such ages respectively as would admit of the possibility of their standing in the relation of parent and child to each other. For example, a man "cannot establish the rela-

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[1] *Baker Hussain Khan* v. *Shurfunissah Begum*, 8 Moo. I.A., 159.

[2] *Ahmed Hossain Khan* v. *Hyder Hossein Khan*, 11 Moo. I.A., 94; *Mohammad Azmat Ali Khan* v. *Ladli Begum*, I.L.R., 8 Cal., 922; *Sadakut Hossain* v. *Mohammed Yusuf*, I.L.R., 10 Cal., 663; *Abdul Razak* v. *Aga Mahomed Jafier Bindanim*, I.L.R., 21 Cal., 666.

tionship of father and son between himself and another unless he is at least twelve-and-a-half years older than the son he intends to adopt or acknowledge."

(2) The person acknowledged must be of unknown descent. If the parentage is *known* to belong to somebody else, no ascription can take place to the acknowledgor.

(3) The acknowledged must believe himself to be the acknowledgor's child, or, at all events, assent to the facts.

An infant who is too young to understand what the relationship implies, or to give an account of himself, is not required to agree to the acknowledgment, nor is his assent a condition precedent to the validity of an acknowledgment, as it is in the case of an adult.

An acknowledgment can take place only when the person acknowledging possesses the legal capacity of entering into a valid contract. The person must be adult, sane and free. An acknowledgment made by an infant (under the Mahommedan Law, one who has not attained the age of puberty) or by a person who is in duress, or who is *non compos mentis*, is invalid.

An acknowledgment of paternity produces all the legal effects of natural paternity; and it vests in the child the right of inheriting from the acknowledgor.

When a man acknowledges a child to be his *legitimate* child such acknowledgment has the effect of giving to the mother the status of a wife, although there may be no evidence of any marriage.[1] It is not necessary that the man should expressly state that the child was his *legitimate* offspring. It is sufficient if he treats it as such.

[1] See Appendix I.

If a man were to cohabit with a woman (not by way of a casual relationship), and to have issue by her, and were to acknowledge such children as his legitimate offspring, such acknowledgment would supply any defect in the evidence of marriage. The acknowledgment of legitimacy proceeds upon the basis of a prior lawful relationship between the parents. But if the marriage is alleged and disproved, the effect of an implied acknowledgment as deducible from mere treatment is minimised; an acknowledgment to be effective must directly or indirectly point to the children as the legitimate issue of the acknowledgor.[1]

Under the Sunni Law, the acknowledgment of a child by a married woman is not valid, inasmuch as it affects another person, *viz.*, the husband, unless it is confirmed by the husband's own declaration. Under the Shiah Law, however, a woman whose husband is dead may acknowledge a child as the lawful issue of her marriage with her deceased husband. But if the fact that the child is her husband's child rests only on her acknowledgment it will only affect her share in the inheritance of the deceased.

An acknowledgment also establishes certain other relationships besides parentage; and in these cases there is no distinction between an acknowledgment made by a man and that made by a woman. For example, a person may acknowledge another as his or her father or mother, or husband or wife, or brother or aunt, and such acknowledgment, if assented to or confirmed by the acknowledged,

[1] Comp. *Dhan Bibi* v. *Lalon Bibi*, I.L.R., 28 Cal., 801.

whether during the lifetime of the acknowledgor or after his or her decease, would constitute a valid relationship, *in so far as the parties themselves are concerned.*

In the case of these acknowledgments, express assent on the part of the acknowledged is necessary to constitute a valid relationship; when there is no such assent proved, the acknowledgment falls to the ground and creates no right on either side.

In these cases, also, the parties must be of unknown descent in order to stand to each other in the alleged relationship without disregard to obvious facts.

If the acknowledgor has any known heir, his acknowledgment of any blood relationship other than that of paternity to a child does not exclude the former from his or her natural right of inheritance, nor vest any right in the acknowledged.

CHAPTER II.

THE PATRIA POTESTAS.

Under the Mahommedan Law, according to all the schools, the power of the father to give his children in marriage without their consent can be exercised in the case of sons until they have attained puberty, when they are emancipated, so far as their personal rights are concerned, from the *patria potestas*, and are at liberty to contract themselves in marriage. As regards female children, there is considerable divergence among the several schools.

Puberty is presumed on the completion of the fifteenth year, according to most of the schools, unless there is evidence to the contrary. As a general rule, however, a person who completes the fifteenth year is considered, without distinction of sex, to be adult and *sui juris*, possessed of the capacity to enter into legal transactions.

After the age of fifteen every contract of marriage entered into on their behalf is dependent upon their express consent; and, among the Hanafîs and the Shiahs, the children of both sexes on attaining majority are free to contract marriages without the consent of their guardians.

The followers of Mâlik and Shâfeï, on the other hand, are of opinion that the exceptional right of *jabr*, in the case of females, continues in force until they are married, and thereby emancipated from paternal control. But as the

followers of the different schools can easily change from one to the other by a simple change of ritual or doctrine, the hardships which might possibly arise from the rigid application of the Shâfeïte and Mâlikite doctrines are obviated.

When the father of the family is incompetent, by reason of mental incapacity, to exercise the right of giving a daughter in marriage, the guardian next in order to him exercises that right.[1] Similarly, when the father is absent at such a distance as to preclude him from acting, the guardian next in order can lawfully contract a child in marriage.[2] Nor is the consent of the father necessary to the marriage of his infant daughter when he has become an apostate from the Mahommedan faith.[3]

Where a father was undergoing a long term of imprisonment, it has been held that the mother and grandmother were entitled to give the daughter in marriage.

The right of *jabr* or the right of imposing the status of marriage appertains primarily to the nearest paternal relations. In the absence of paternal relations, maternal relations within the prohibited degrees can give a minor in marriage. For example, when the father's brother is present he is the preferential *walî*, and neither the mother nor the mother's relations have any right, though if the proposed union be improper the mother or the maternal relations can move the Kazi for an injunction to restrain the *walî* from entering into the contract. And

[1] *Comp. Muhammad Ibrahim* v. *Gulam Ahmad*, 1 Bom., 236.

[2] *Kaloo* v. *Gariboollah*, 10 W.R., 21.

[3] In the matter of *Mahin Bibi*, 13 B.L.R., 160.

they can do so, even if the father is entering into the contract.

Where a minor is contracted in marriage by any person other than the father or grandfather, such minor on attaining puberty has an absolute right to ratify or rescind the contract.[1] But the minor has an option even in the case of a marriage contracted by a father or grandfather if the latter was a prodigal or addicted to evil ways or the marriage was *manifestly* to the minor's disadvantage.

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[1] See *post*, p. 74.

- diff. between guardians de jure and de facto. Br

CHAPTER III.

THE CUSTODY OF CHILDREN.

"THE mother is of all persons," says the *Fatâwa-i-Alamgiri*, "the best entitled to the custody of her infant children during the connubial relationship as well as after its dissolution."

This right belongs to her *quâ* mother, and nothing can take it away from her, except her own misconduct. It makes no difference whether she is a Moslemah or a non-Moslemah.

When the children are no longer dependent on the mother's care, the father has a right to educate and take charge of them, and is entitled to the guardianship of their person in preference to the mother.

Among the Hanafîs, the mother is entitled to the custody of her daughter until she attains puberty; among the Mâlikîs, Shâfeïs and Hanbalîs the custody continues until she is married.

There is greater divergence among the different Sunni schools with reference to the mother's custody of her male children. The Malikîs hold that the right of *hizânat* in respect of a male child continues until such time as he arrives at puberty.

The Shâfeïs and Hanbalîs allow the boy at the age of seven the choice of living with either of its parents.

The Hanafî jurists, however, hold that the mother's *hizânat* of a male child ends with the completion of his seventh year.

Among the Shiahs, the mother is entitled to the custody of her children without distinction of sex until they are weaned. During this period, which is limited to two years, the children cannot, under any circumstance, be removed from their mother's care without her consent. After the child has been weaned, its custody, if a male, devolves on the father, and if a female, on the mother. The mother's custody of a female child continues to her seventh year.

According to the Hanafîs the persons entitled to the custody of children come in the following order:—

(1) The mother; (2) the mother's mother; (3) then the father's mother, how remote soever; (4) full sister; (5) uterine sister; (6) consanguine sister; (7) the daughter of the full sister; (8) the daughter of the uterine sister; (9) the full maternal aunts; (10) uterine maternal aunts; (11) the daughter of the consanguine sister; (12) brother's daughters; and (13) the paternal aunts.

According to the Hanafîs if there be no female relations, or if none of them are legally qualified to exercise the right, it passes (1) to the father; (2) the grandfather, how remote soever; (3) to the full brother; (4) to the consanguine brother; (5) to the full brother's son; (6) to the consanguine brother's son; (7) to the full paternal uncle, etc.

In all these cases the nearer excludes the more remote. When there are no agnates qualified to take charge of the child, the right passes to the male uterine relations.

No male has a right to the custody of a female child unless he is a *mahram*, that is, stands within the prohibited degrees of relationship.

The Shiahs are in agreement with the Sunnis with regard to the general principles governing the right of *hizânat*. But among them, in the absence of the mother, the right passes to the father, and failing him to the grand-parents and other ascendants. When there are no ascendants, the right passes to the collaterals within the prohibited degrees, the nearer excluding the more remote.

The right of *hizânat* or custody, according to all the schools, is lost (1) by the subsequent marriage of the *hâzina* [1] with a person not related to the infant within the prohibited degrees; (2) by her misconduct; and (3) by her changing her domicile so as to prevent the father or tutor from exercising the necessary supervision over the child; apostasy also is a bar to the exercise of the right of *hizânat*.

The custody of illegitimate children appertains exclusively to the mother and her relations. The custody of a foundling belongs to the person who found it or to the State.

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[1] The person entitled to the *hizânat* or custody.

CHAPTER IV.

THE STATUS OF MARRIAGE.

Section I.—Capacity and Form of Marriage.

"Marriage is an institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchastity."

"Marriage when treated as a contract is a permanent relationship based on mutual consent on the part of a man and a woman between whom there is no bar to a lawful union."

Regarded as a social institution, marriage, under the Mahommedan Law, is essentially a civil contract. It is founded on proposal on one side and acceptance on the other. It does not require to be evidenced by any writing nor is the presence of witnesses *essentially* necessary for its legality.

Capacity.—The validity of a marriage under the Mahommedan Law depends primarily on the capacity of the parties to marry each other.

The capacity to contract a marriage depends on several conditions. In the first place, the parties must be able to understand the nature of the act. For, if either of them is *non compos mentis* or is incapable of understanding the nature of the contract, it is invalid. In the second

place, they must be adult (in cases where the marriage is not contracted for them by their guardians), and they must not be acting under compulsion.

"Among the conditions," says the *Fatâwa-i-Alamgiri*, "which are requisite for the validity of a contract of marriage are understanding, puberty and freedom in the contracting parties, with this difference that whilst the first requisite is essentially necessary for the validity of the marriage, as a marriage cannot be contracted by a *majnûn* (insane), or a boy without understanding; the other two conditions are required only to give operation to the contract, as the marriage contracted by a (minor) boy (possessed) of understanding is dependent for its operation on the consent of his guuardian." [1]

The same conditions are necessary in the case of a girl as in the case of a boy; she, also, in order to contract a valid marriage, must be major and sane.

Besides puberty and discretion, the capacity to marry requires that there shall be *no legal disability or bar to the union of the parties*;—in the first place, they should not be within the prohibited degrees, or so related to, or connected with, each other as to make their union unlawful; in the second place, the woman must not be the wife of another man, nor must the man be the husband of four wives existing at the time when he enters into the contract.

Section II.—The Legal Disabilities to Marriage.

The want of capacity founded on relationship arises firstly, from legitimate and illegitimate relationship of

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Comp. *Subrati* v. *Tungli*, 2 Cal., W.N., 245.

blood (consanguinity) ; and secondly, from affinity ; thirdly, from fosterage.

The prohibitions founded on consanguinity are the same among the Sunnis as among the Shiahs. No marriage can be contracted (*a*) with the ascendants ; (*b*) with the descendants ; (*c*) with relations of the second rank, such as brothers and sisters or their descendants ; (*d*) with paternal and maternal uncles and aunts. Nor can a marriage be contracted with a natural offspring or his or her descendants. Nor can a man marry his father's wife, or any other ascendant's wife, or his son's or any other descendant's wife.

Affinity and fosterage also give rise to prohibitions in respect of certain relations. For example, a man cannot marry his wife's mother or daughter, nor can a woman marry her husband's son by any other wife, and a man cannot marry his foster-sister, nor can the foster-mother marry her foster-child's brother.

The bar of affinity arising from marriage is created also by adulterous relationship. For example, if a man lives with a woman without the sanction of marriage, her mother or daughter are as much "prohibited to him" as if she had been lawfully married to him. Similarly, the woman cannot marry the man's son or father.

A woman who is already married cannot marry again so long as the first marriage is existing. But, except among the Mutazalas who do not recognise the lawfulness of polygamy, a man may have four wives at one and the same time, though not more, provided he can deal equitably with all ; if he cannot, he must have only one.

All the schools, which recognise polygamy to this limited extent, prohibit contemporaneous marriages with two women so related to each other that, supposing either of them to be a male, a marriage between them would be illegal. But if such a marriage be contracted *in fact* it would only be *invalid*. In other words, although the judge may separate the parties, yet any children born of the union would be legitimate.

According to the Sunnis, a Moslem can contract a lawful and valid marriage with a woman belonging to any one of the revealed faiths, in other words, Judaism or Christianity, but not with a worshipper of idols or fire.[1] There is no legal bar, however, to a Moslem marrying a non-scripturalist; a marriage even with an idolatress is only *invalid* and not void.

A Moslemah is prohibited from marrying a non-Moslem. This prohibition was founded on evident political reasons and has its analogy in other systems. But here again the union, according to one authority,[2] is only *invalid*.

Among the Shiahs there is some difference of opinion. The Mutazalas, the Usûlis and a large section of the

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1 About Zoroastrianism there is a difference of opinion, some of the jurists, chiefly among the Shiahs, hold it to be one of the "revealed" faiths; others, chiefly among the western Sunnis, hold it to be the same as Magianism or fire-worship. It has sometimes been supposed that when a non-scriptural woman marries a Moslem, she must first adopt Islâm in order that the marriage may be valid. If there is an actual marriage, subsequent adoption of the Islâmic faith would make the union valid and no fresh ceremony would be needed.

2 The *Muntaka*, a work of great authority among the Hanafîs.

Akhbâris agree with the Sunnis in holding that a marriage with a scripturalist woman is as valid and lawful as with a Moslemah. Some of the Akhbâris, however, think that only a temporary marriage can be contracted with a non-Moslemah.[1]

Section III.—The Form of Marriage.

There are several other conditions laid down in the Mussulman Law for the contractual performance of a marriage, some of which, however, when properly considered, resolve themselves to a mere question of form. It is required (*a*) that the parties to the contract "should hear each other's words," that is, the conditions of the contract should be understood by both; (*b*) that if *sui juris*, they should actually consent to the contract; and (*c*) that the husband and wife should be distinctly specified, so that there should be no doubt as to their identity.

It is also necessary, under the Sunni Law, that there should be witnesses present to attest the conclusion of the contract. Two witnesses at least should be present to testify that the contract was properly performed and in accordance with the conditions laid down above. When the wife is a non-Moslemah the witnesses may be of the same faith as herself.

Under the Shiah Law, "the presence of witnesses is not necessary in any matter regarding marriage." A

[1] But all the Shiah schools seem to discountenance the marriage of a Moslemah with a non-Moslem; comp. *Bakhshi Kishore Prasad* v. *Thakur Prasad*, I.L.R., 19 All., 375.

marriage *per verba de præsenti*, according to this school, is valid at all times, whether the marriage was contracted in a distant country or not.

The consent may be given either in express terms or by implication.

Marriages may be contracted among the Sunnis and the Shiahs through the agency of proxies or *vakîls*. For their appointment witnesses are not necessary, and their powers are governed by the same rules of law as apply to other contracts.

When a marriage is contracted through an agent or by correspondence, under the Sunni Law the receipt of the message or letter making the proposal must be attested by two witnesses, and so also the assent.[1]

Section IV.—Proof of Marriage.

Marriage may be proved directly or presumptively. Directly by means of the oral testimony of the witnesses present during the marriage, or by documentary evidence in the shape of a deed of marriage.

C.W. IV 220. Marriage may be proved *presumptively* by the statement of the parties or their general conduct towards each other. "When a person," says the *Fatâwa-i-Alamgiri*, "has seen a man and woman dwelling in the same house (*bait*) and behaving familiarly towards each other as husband and wife, it is lawful for him to testify that that woman is the man's wife."[2]

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[1] For the requisites to constitute a valid marriage, see I.L.R., 19 Cal., 79.

[2] Comp., *Hidayatoollah* v. *Rai Jan Khannon*, 3 Moore's I.A., 295; *Mahatala Bibee* v. *Ahmed Haleemoozaman*, 10 Cal., L.R., 293; *Wise* v.

Marriage legalises connubial relationship, it imposes on the husband the obligation of paying the ante-nuptial settlement and fulfilling all the ante-nuptial agreements made in consideration of marriage; it establishes on both sides the prohibition of affinity and the rights of inheritance; it obliges the husband to be just towards his wife, to treat her with respect and affection; and exacts from her in return obedience and faithfulness to him.

Section V.—Illegal and Invalid Marriages.

Connections which are illegal are null and void *ab initio*, and create no civil rights and obligations between the parties. The wife has no right of dower against the husband unless the marriage is consummated, and neither of them is entitled to inherit from the other, in case of the death of either, during the period when the contract is supposed to have existed. The illegality of such unions commences from the date when the contracts are entered into, and the marriage is considered as totally non-existing "in fact as well as in law."

Marriages contracted within the degrees prohibited by the Mussulman Law fall under the head of marriages which are null and void *ab initio;* they carry no civil rights and produce no legal effect under the Sunni Law. If the marriage has been consummated, the woman becomes entitled to her customary dower.

So, also, if a man were to go through a ceremony of marriage with a woman who was already married to an-

Sunduloonissa Chowdhrance, 11 Moore's I.A., 177; *Nawabunnissa* v. *Fuzloonissa*, Marshall, 428.

other, with or without a knowledge of that fact, such an union would be absolutely illegal.[1]

Marriages, which are not vitiated and rendered illegal by a radical defect of the character above described, stand on a different footing. The children conceived and born during the existence of the contract are held to be legitimate, and the wife acquires as usual a right to her dower. Various examples of an invalid marriage are given in the law-books, *e.g.*, a marriage, among the polygamous schools, of one sister contemporaneously with another sister; a marriage with an idolatress, &c.

Option of Puberty—Khyâr-ul-Bulûgh.—When a minor has been contracted in marriage by the father or grandfather with an *equal*, technically called *kufû*, in other words, when the marriage is in all respects suitable, the minor has no option on attaining puberty. But when the marriage is *unequal*, or if the father or grandfather is not honest, or is a prodigal, or of bad behaviour, or it appears that the marriage is to the manifest disadvantage of the minor, unless set aside at the instance of any other guardian, it remains dependant on his or her ratification on attaining majority.

When the marriage is contracted for a minor by any person other than the father or grandfather, such minor, whether a girl or a boy, has the option of ratifying or rescinding the contract on attaining puberty irrespective of the consideration of injury.

Under the Sunni Law, the marriage remains intact until set aside. Under the Shiah Law, it is of no effect until it is expressly or impliedly ratified.

[1] For the legitimacy of the issue of such unions, see *ante*, p. 53.

Where such a marriage has been contracted, the matter ought to be propounded to her on her attaining majority so that she may advisedly give or withhold her assent.[1]

Under the Sunni Law, if the option be exercised and the contract rescinded, it is a condition that a judicial declaration should be obtained, impressing on the rescission the *imprimatur* of the Kâzi.

But, supposing a girl given in marriage when an infant on attaining puberty rescinds the contract and marries another person, she cannot be convicted of bigamy, though the Kâzi may not have made his decree. But so long as the rescission has not been expressed in this decisive form or has not received the sanction of the Kâzi, under the Sunni Law the relationship continues, and in case either of the parties dies before the Kâzi's decree, the survivor becomes entitled to succeed to the deceased. The option must be exercised as soon as puberty is attained. Under the Shiah Law there is no such difficulty, for, according to that law, marriage contracted by an *unauthorised* guardian (*fazûli*) is wholly ineffective until ratified.

According to the Hanafîs, as well as the Shiahs, a woman who is *sui juris* can enter into a contract of marriage with whomsoever she pleases, but if the union is *ill-assorted* (*wanting in equality*) the relations of the woman may interfere and move the Kâzi to set aside such marriage at any time before there is any issue born of such marriage.

A Mutaa or Temporary Marriage.—Among the Akhbâri

[1] *Mulka Jehan Sahiba* v. *Mahommed Uskuree Khan*, L.R., I.A., Supp. Vol., 192.

Shiahs, a temporary contract of marriage or a contract for a limited term is recognised as valid. Such marriages were frequent among the pagan Arabs and the Sabæans, and were, for a time, allowed by the Arabian Prophet. They were, however, forbidden in the tenth year of the Hegira. But somehow they have remained engrafted on the Akhbâri traditions. According to them, a man and a woman (possessing the capacity to marry) may enter into a contract of marriage for any period they like. Such marriage becomes dissolved either by efflux of the period fixed, or may be put an end to by mutual agreement. There is no divorce in such a marriage, but some of their lawyers think that the husband may "give away" the term without the consent of the wife. This view, though recognised in one case[1] by the Calcutta High Court, is opposed to the nature of the contract which is founded essentially on mutual agreement. Besides it proceeds upon a fallacious reasoning that as the wife is merely a debtor, the creditor (the husband) may discharge the debtor without her consent, a view which is contrary to the opinion of the great Shiah jurists.

The children of such unions are legitimate and inherit from their parents, though the married parties do not, unless there is a contract to that effect.

Section VI.—Effect of Apostacy from Islâm on the Status of Marriage.

Under the Mahommedan Law, the apostacy of the husband has the effect of dissolving the marriage tie.

1 *Kumar Kadar* v. *Bibi Luddun*, I.L.R., 10 Cal., 878.

The Native Convert's Marriage Act (XXI of 1866) was specially designed to meet the case of converts to Christianity from Hinduism and other cognate creeds, which do not recognise the dissolution of a marriage-tie once contracted. It exempts, however, from its purview Mahommedans and Jews.

The Mahommedan Law provides that when a married couple apostatise together the marriage remains intact. So, also, if the woman were to become a pervert to a scriptural religion the marriage would not be dissolved. But where the husband apostatises and the wife, though continuing in her own faith, elects to live with him after his apostacy, the cohabitation would be invalid.

Conversion to the Islâmic faith on the part of a man following any of the revealed religions (Judaism, Christianity or Zoroastrianism) does not lead to a dissolution of his marriage with a woman belonging to his old creed. For example, if a Hebrew or a Christian husband were to adopt Islâm and the wife were to continue in the religion of her race, the marriage would remain lawful and binding. But should an idolatrous husband, married to an idolatrous wife, become a Mussulman, the marriage between them would become dissolved, unless she also adopts Islâm. When a non-Moslem female, whether a scripturalist or not, married to a husband who also is a non-Moslem, adopts Islâm, her marriage would become dissolved under the following circumstances. If the conversion takes place in an Islâmic country (*Dâr-ul-Islâm*) where the laws of Islâm are in force, she will have to apply to the Kâzi to summon the husband to adopt the Moslem faith,

and on the husband's refusal to do so the marriage would be dissolved. Should the conversion take place in a non-Islâmic or alien country (*Dâr-ul-Harb*) the marriage would become dissolved on the expiration of three months from the date of the woman's adoption of Islâm. The Calcutta High Court has held [1] that India is not a non-Islâmic country, and that consequently when a married non-Moslem woman adopts the Mahommedan faith and thereafter contracts a fresh marriage without applying to a Judge or a Magistrate to call upon the husband to adopt Islâm, she is guilty of bigamy. But it does not say what would happen if the Judge or Magistrate refused to listen to the prayer of the woman, or the husband declined to accede to her demand. It is to be presumed, however, that the Court's conscience would be satisfied on her making the application, and the first marriage would be regarded as dissolved on the expiration of three months.

Maintenance.—The husband is legally bound to maintain his wife whether she belongs to the Moslem faith or not, so long as she does not desert him against his will.

If the wife, however, be a minor, so that the marriage cannot be consummated, in that case, according to the Hanafî and the Shiah doctrines, there is no legal obligation on the husband's part to maintain her.

Nor is a husband, under the Hanafî and the Shiah Law, entitled to the custody of the person of a minor wife whom he is not bound to maintain.[2]

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[1] I.L.R., 18 Cal., 236.

[2] In the matter of *Khatija Bibi*, 5 B.L.R., O.C., 55; and in the matter of *Mahin Bibi*, 15 B.L.R., 160.

Restitution of Conjugal rights - Cruelty - Impotency in adultery - Poverty of husband - Failure by husband to the performance of obligations resulting from marriage contract - 46/592.

With the Shâfeïs it makes no difference in the obligation of the husband to maintain his wife, whether she be a minor or not.

Desertion without leaving any means of support for the wife or family entitles the wife to a separation under the Shâfeï Law; and the Hanafî Kâzi would give effect to the order if properly passed.

The Judicial Committee of the Privy Council have decided in a recent case that a widow is not entitled to maintenance out of her deceased husband's estate.[1]

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[1] *Aga Mahomed Jaffer Bindaneem* v. *Koolsoom Beebee*, 1 Cal., Weekly Notes, 449.

Dower, Amir Ali 405-

14 C.W.N 865-

12 C.W.N 84.

CHAPTER V.

DOWER.

SECTION I.—GENERAL OBSERVATIONS.

THE *mahr* of the Islâmic system is similar in all its legal incidents to the *donatio propter nuptias* of the Romans. It is a settlement in favour of the wife, made prior to the completion of the marriage contract in consideration of the marriage. The settlement of a dower is an essential condition in a marriage, but the validity of the marriage does not depend upon its express mention, so that where no dower is settled at the time of the contract, that fact does not affect its validity; and the wife becomes entitled to the dower customary in her family. And even where it is made a condition that there should be no dower, the law, nevertheless, attaches the liability to the husband.

The amount of dower or *mahr* varies in different countries; there is no fixed rule as to the maximum. It depends on the social position of the parties and the conditions of the society in which they live.

SECTION II.—THE DIFFERENT KINDS OF DOWER.

When no dower is fixed at the time of the marriage, or has not been distinctly specified either before, or after marriage, or has been intentionally left indeterminate, the woman becomes entitled to what is called the *mahr-ul-misl*, "the dower of her equals," or "the customary dower."

The customary dower of a woman is regulated with reference to the social position of her father's family and her own personal qualifications.

The *mahr-ul-misl* may vary in amount not only according to the social position of the woman's family and her own personal qualifications, but also according to the wealth of her husband, the circumstances of the times, and the conditions of society surrounding her.

Under the Sunni Law, dower becomes due upon the consummation of the marriage either actually or presumptively. Consummation is presumed when the parties have been together under circumstances which may validly give rise to the inference. This is called *valid retirement* (*Khilwat-us-Sahîh*). Under the Shiah Law, dower becomes due upon the completion of the contract, *viz.*, consummation. It is usual, however, to make a portion payable on demand, and another portion on the dissolution of the marriage-tie. That portion of the dower, which is payable immediately on demand, is called the *mahr-ul-muajjal*, "prompt" or "exigible;" and the wife can refuse to enter the conjugal domicile until the *prompt* portion of the dower has been paid. The other portion is called *mahr-ul-muwajjal*, "deferred dower," which does not become due until the dissolution of the contract, either by death or divorce. It is customary in India to fix half the dower as *prompt* and the remaining moiety as *deferred;* but the parties are entitled to make any other stipulation they choose.

When no time is specified for the payment of the dower or where its nature is described only in general

terms, and it is not mentioned in the contract of marriage how much is *prompt* and how much *deferred*, it must be seen what is the custom among the class of people to which the parties belong, and the question must be decided on that basis.[1]

When the marriage is dissolved before consummation or *valid retirement*, the wife becomes entitled to half the dower under the Sunni Law. Under the Shiah Law, there is a difference of opinion, some lawyers agreeing with the Sunnis; others holding that, in such a case, the wife is entitled only to a present. The former is regarded as the preferable opinion.

Where a man suffering from a mortal illness divorces his wife, and then dies before the expiration of her period of probation (*iddat*), which is three months, she is entitled to a share in his inheritance.

If one of the married parties die before consummation, the survivor is entitled to a share in the deceased's estate.

An exchange of property for dower is called a *Baimukâsa*.

Under the Sunni Law, the wife is entitled to refuse co-habitation, until her prompt dower is paid, and the husband would not be entitled to maintain an action for restitution of conjugal rights[2] until such payment. If he pays the amount after the suit is brought, he would be entitled to a decree.[3]

[1] Comp. *Tawfikunnissa* v. *Ghulam Kanbar*, I.L.R., 1 All., 506; *Eidan* v. *Mazhar Hossain*, I.L.R., 1 All., 483.

[2] *Eidan* v. *Mozhar Hussain*, I.L.R., 1 All., 483; *Wilayet Hussain* v. *Allah Rakhi*, I.L.R., 2 All., 831.

[3] *Abdul Kadir* v. *Salim*, I.L.R., 8 All., 149.

The widow's claim for dower is only a debt against the husband's estate and has priority over legacies and the rights of the heirs, but she has no lien over any specific property. Where, however, she has obtained actual and lawful possession of the estate of her husband, under a claim to hold the same for her dower, she will be entitled to retain possession until the debt is satisfied, with the usual liability for account to the heirs (*Ahmed Hussain* v. *Mussumat Khadija*).[1] The lien which a Mahommedan widow has over the estate of her deceased husband, for her unpaid dower is a purely personal one and does not descend to her heirs.[2]

When she has obtained possession under a claim of dower, the heirs can sue to recover the property on the ground that the dower-debt has been satisfied from its usufruct.

Limitation does not run against *deferred* dower until it has become due, either by the death of one of the parties or by divorce. The *prompt* or *exigible* dower, however, is a debt always due, and demandable during "the subsistence of the marriage, and certainly payable on demand." On a clear and unambiguous demand for payment of dower by the wife, and its refusal by the husband, a cause of action accrues, against which limitation would begin to run. When there has been no explicit demand on the wife's part, limitation will not affect her claim with reference to the *exigible* dower. The

[1] 14 Moo. I.A., 398; see also *Amanatunnissa* v. *Bashirunnissa*, I.L.R., 17 All., 77.

[2] *Hadi Ali* v. *Akbar Ali*, I L.R., 20 All., 262.

wife has an absolute option to demand the *mahr* during the lifetime of her husband, and to elect her own time for demanding it.[1]

An agreement entered into between the husband and wife *before marriage* that neither of them should inherit to the other is invalid; and upon the death of either, the survivor would become entitled to his legal share in the deceased's inheritance.

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[1] *Khajurunnissa* v. *Saifullah Khan*, 15 B.L.R., A.C., 306. See also *Khajurunnissa* v. *Raisunnissa*, 5 B.L.R., 84, where the claim was barred; and *Ameeroonnissa* v. *Moradoonnissa*, 6 M.I.A., 261.

CHAPTER VI.

THE DISSOLUTION OF THE MARRIAGE CONTRACT.

Section I.—General Observations.

The generality of the schools accord to both the parties to the contract the option of dissolving the tie or relationship under specified circumstances.

The Kâzi, also, has the power of dissolving the marriage on the application of either the husband or the wife on the ground of cruelty, desertion, and like causes. He is also authorised to cancel the marriage for initial disability on the part of either of the parties to fulfil the contract, or on the ground of deception or fraud practised on either side.

When the dissolution of the marriage-tie proceeds from the husband, it is called *talâk*.

When it takes place at the instance of the wife, it is called *khulâ*.

When it is by mutual consent, it is called *mubârât*.

In all these cases, according to the Sunnis and a large number of the Shiahs, no decree of the Judge is necessary to dissolve the union. The mere act of the parties is considered as sufficient in law, provided all the conditions required for effecting a valid divorce are complied with.

It is, however, strongly inculcated in the Koran that the parties should settle conjugal disputes by arbiters chosen from the family of the husband and the wife.

The Prophet also denounced *talâk* as "the most detestable of all permitted acts."

The Mutazalas hold that in every case the sufficiency of the cause for which a cancellation is sought should be considered by the Judge.

Section II.—Talâk.

Two kinds of *talâk* are recognised by the Hanafîs, *viz.*: (1) the *talâk-us-sunnat;* and (2) the *talâk-ul-bidaat* or *talâk-ul-badaï.*

The *talâk-us-sunnat* is the divorce which is effected in accordance with the rules laid down in the traditions (the *sunnat*) handed down from the Arabian Prophet.

The *talâk-ul-bidaat,* as its name signifies, is the heretical or irregular mode of divorce, which was introduced in the second century of the Mahommedan era.

The Shiahs and the Mâlikîs do not recognise the validity of the *talâk-ul-bidaat,* whilst the Hanafîs and the Shâfeïs agree in holding that a divorce is effective, if pronounced in the *bidaat* from, "though in its commission the man incurs a sin."

The *talâk-us-sunnat* is either *ahsan* or *hasan,*—very proper or simply proper. In the *talâk-us-sunnat* pronounced in the *ahsan* form, the husband is required to submit to the following conditions, *viz.:* (1) he must pronounce the formula of divorce once in a single sentence; (2) he must do so when the woman is in a state of purity (*tahr*), and there is no bar to connubial intercourse; and (3) he must abstain from the exercise of conjugal rights, after pronouncing the formula, for the space of three terms or three months.

This latter clause is intended to demonstrate that the resolve, on the husband's part to separate from the wife, is not a passing whim but the result of a fixed determination; on the lapse of the term of three months, or three *tahrs*, the separation takes effect as an irreversible divorce (*talâk-ul-bâin*).

In the *hasan* form, the husband is required to pronounce the formula three times, in succession at the interval of a month, during the *tahr* of the wife. When the last formula is pronounced, the *talâk* or divorce becomes irreversible. These two forms alone, as stated before, are recognised by the Shiahs.

In the *talâk-ul-bidaat* the husband may pronounce the three formulæ at one time, whether the wife is in a state of *tahr* or not. The separation then takes effect definitively after the woman has fulfilled her *iddat*.[1]

The Sunnis as well as the Shiahs allow recantation, that is, a husband who has suddenly and under inexplicable circumstances pronounced the formula against his wife may recant any time before the term of three months has expired. When the power of recantation is lost, the separation of *talâk* becomes *bâin;* while it continues, the *talâk* is simply *rajaï* or reversible.

When a definite and complete separation (*talâk-ul-bâin*) has taken place, the parties so separated cannot re-marry without the woman going through the forma-

[1] *Iddat* is the period of probation of three months to see whether the woman is *enceinte* or not. As to the validity of a *talâk-ul-bidaat*, see *Firzund Hossain* v. *Tanu Bibi*, I.L.R., 4 Cal., 588; *Hamid Ali* v. *Imtiazan*, I.L.R., 2 All., 71; and *Ibrahim* v. *Syed Bibi*, I.L.R., 12 Mad., 63.

lity of marrying another man and being divorced from him.

This rule was framed with the object of restraining the frequency of divorce in Arabia. The check was intended to control a jealous, sensitive, but half-cultured race, by appealing to their sense of honour.

As a general rule, the power of *talâk* under the Sunni doctrines is larger than under the Shiah Law.

According to the Sunni doctrines, *talâk* may be effected expressly, in terms which leave no doubt as to the intention of the repudiator (*sarîh*); or by the use of ambiguous or implicative expressions (*b'ilkinâyèh*).

According to the Shiahs, repudiation pronounced "implicatively," or in ambiguous terms, does not take effect, whether there be intention on the part of the repudiator or not, nor does it take effect if it be made dependant upon or subjected to any condition.

Neither the Sunnis nor the Shiahs (with certain exceptions among the Usûli lawyers), require that the *talâk* should be pronounced in the presence of the wife. But so long as it does not come to her knowledge she is entitled to her maintenance.

Section III.—Capacity of Talâk.

Under the Shiah Law there are three conditions essential to the capacity of pronouncing a valid *talâk*. It is required (1) that the husband should have attained majority; (2) that he should be sane and possessed of sound understanding; (3) that, on his part, there should be distinct intention to dissolve the marriage-tie.

Repudiation pronounced under compulsion is invalid and ineffective under the Shiah Law.

A repudiation obtained by fraud, or given under undue influence, is also invalid under the Shiah Law. Intention is a necessary element to the validity of all *talâks*.

A *talâk* pronounced by a person in a state of intoxication, or by one labouring under a temporary stupor from the use of narcotics, or any other cause, is likewise invalid. So also in the case of a *talâk* given by mistake or inadvertence, in anger or in jest, or when the words have been uttered whilst talking in sleep.

According to the Hanafî doctrines, "a *talâk* pronounced by any husband who is of mature age (*bâligh*) and possessed of understanding (*aâkil*) is effective, whether he be free or a slave, willing or acting under compulsion; and even though it were uttered in sport or jest, or inadvertently by a mere slip of the tongue."

Among the Hanafîs, a *talâk* pronounced by a man whilst in a state of intoxication is "effective," unless the liquor or the drug which caused the intoxication was administered against his will, or was taken, "for a necessary purpose," *i.e.*, medicinally.

In the case of *Ibrahim Moolla* v. *Enayet-ur-Rahman*,[1] the High Court of Calcutta held that the divorce of one "acting under compulsion is effective." The principle, however, enunciated in this judgment ought to be confined exclusively to the Hanafîs.

All the Sunni jurists agree that the repudiation of a

[1] 4 B.L.R., A.C., 13.

boy under puberty, though possessed of understanding, is ineffective.

Under the Shiah Law, it is further necessary that there should be two reliable witnesses present at the time of repudiation.

It is a further condition under the Shiah doctrines that the witnesses should be present together.

The Sunnis, on the contrary, do not require the presence of witnesses.

Under the Shiah Law, a *talâk*, pronounced in a paroxysm of anger, during which all self-control is lost, is invalid. Under the Sunni Law, it is valid.

But neither school requires the *talâk* to be pronounced in the presence of the wife. And a deed of divorce signed by the husband executed in the absence of the wife was held to be valid.[1]

The husband can delegate the power of divorce to the wife to be exercised on breach of any of the conditions of marriage.[2] This is called, in Mahommedan Law, *tafwîz*.

Section IV.—Khulâ and Mubarat.

When a divorce takes place at the instance of the wife, she has to give up to her husband either her settled dower or some other property, in order to obtain a discharge from the matrimonial tie ; such a divorce is, consequently, called a *khulâ*. But the woman's right is a

1 *Waj Bibi* v. *Azmat Ali*, 8 W.R., 23.

2 *Ashraf Ali* v. *Ashad Ali*, 16 W.R., 260; *Budrunnissa Bibi* v. *Nufeeutullah*, 7 B.L.R., 442, S.C., 15 W.R., 555.

qualified right. The husband has the option of refusing to assent to the *khulâ*. The Kâzi, however, has the power of compelling him to do so upon proper grounds.[1]

When a divorce is effected by mutual consent on account of incompatibility of temper or otherwise, it is called a *mubârât*.

The term *mubârât* signifies a mutual discharge from the marriage-tie. Under the Sunni Law, when both the parties enter into a *mubârât*, all matrimonial rights which they possess against each other fall to the ground.

The same conditions are required for the validity of a *mubârât* as in the case of a *khulâ* or *talâk*.

The *Hâkim-ush-sharaa* or Kâzi has the power of granting a divorce not only for habitual ill-treatment, for non-fulfilment of ante-nuptial engagements, or for insanity, but also for incurable impotency existing prior to marriage.

A separation by decree of the Judge can take place also when the husband fails to carry out or to abide by the terms of the matrimonial contract.

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[1] The Madras High Court has held that a *khulâ* though granted under compulsion is valid, I.L.R., 3 Mad., 347; this view is, however, open to question.

Age of puberty – Minority – onus – 67/6

CHAPTER VII.

THE STATUS OF INFANCY.

Section I.—Age of Majority.

The Islâmic system recognises two distinct periods of majority, one of which has reference to the emancipation of the person of the minors from the *patria potestas*, and the other to the assumption by them of the management and direction of their property.

These two periods are designated as *sinn-i-bulûgh* and *sinn-i-rushd*, the age of puberty and the age of discretion.

Among the Hanafîs and the Shiahs, puberty is presumed on the completion of the fifteenth year; among the Mâlikîs, on the completion of the eighteenth year. The Hanafîs and the Shiahs, generally speaking, consider *rushd* (discretion) and *bulûghyèt* (puberty) to go together, and therefore the personal emancipation of minors, which occurs on their attaining puberty, carries with it the emancipation of their goods from the hands of their guardians. They then become entitled to take over the charge of their own property.

The principle of two distinct, and yet concurrent, periods of majority is maintained also in the Indian Majority Act (Act IX of 1875). Section 2, clause *a* of that Act, declares "nothing herein contained shall affect the capacity of any person to act in the following matters (namely), marriage, dower, divorce, and adoption." Section 3

provides that, "subject as aforesaid," every minor who should not be a ward of Court, [whether under Act VIII of 1890, which has been substituted for Act XL of 1858, or the Court of Wards Act (B.C.),] should be deemed to attain his or her majority on the completion of *the eighteenth year and "not before."* But every minor of whose person or property a guardian "has been" or shall be appointed by a Court of Justice, and every minor under the jurisdiction of the Court of Wards, "shall be deemed to have attained his majority, when he or she shall have completed the age of twenty-one years, and not before."

Section II.—Guardianship or Tutelage.

Guardianship or tutelage comprehends (i) the direction or care of the person of the infant, and this arises when the *hizânat* and the guardianship are vested in one and the same person; and (ii) a simple supervisory direction over the person of the infant, when the *hizânat* is vested in another person; and (iii) the administration and care of the property of the minor.

Guardians are either natural, testamentary, or appointed.

The first and primary natural guardian is the father. Among the Hanafîs, when the father is dead, the guardianship of his minor children devolves upon his executor. When he has died without appointing an executor but his own father is alive, the tutelage of the minor children is allowed to the grandfather; when the grandfather also is dead, the guardianship devolves on *his* executor. Among

the Shiahs, when the grandfather is alive, he is entitled to the guardianship in preference to the father's executor. In default of the natural as well as the testamentary guardians, *viz.*, the father and his executor, the obligation of appointing a tutor or curator, for the preservation and management of the minor's property, rests on the Kâzi or Judge as representative of the Government or "Sultan." Among the Hanafîs, if a person sufficiently qualified to undertake the guardianship of the minors can be found among the male agnates of the deceased father, such person should be appointed by the Kâzi in preference to a stranger, but no relative other than the father or grandfather has any right to interfere in any way with the property of a minor unless appointed by the Judge.

The father has at all times the amplest power to make by will such dispositions as he may think best relative to the guardianship of his minor children and the protection of their interests.

(a) A mother is entitled to the custody of the person of her minor children, but she has no right to the guardianship of their property. If she deals with their estate without being specially authorised by the Judge or by the father, her acts should be treated as the acts of a *fazûlî* (an unauthorised person). If they are to the *manifest* advantage of the children, they should be upheld; if not, they should be set aside. 24 Cal 86. & 65.

A mother, whether Moslemah or non-Moslemah, can be validly appointed executrix of the father, and when so appointed is entitled to exercise the rights and power which the law vests in testamentary guardians.

(a) But see 29 All 10.

A testamentary guardian stands in *loco patris* in every matter relating to the welfare of the minors and the care and preservation of their property. In certain cases, and especially when the appointment of the *wasî* or executor is general in its nature, the father's or grandfather's executor may delegate the trust to his own executor.

A guardian is authorised to sell the moveable property of his ward for an adequate consideration and invest the proceeds in a "profitable undertaking" for the benefit of the minor.

(*a*) A guardian may not sell his ward's real property "into his own hands" or into the hands of any one connected with him, under any circumstance.

(*b*) He may sell it to a stranger for double its value or where it is to the *manifest* advantage of the ward.

(*c*) He may also sell it when there are some general provisions in the *wasîyêt* (will) of the testator, which cannot be carried into effect without the sale of the property.

(*d*) When the property is required to be sold for the purpose of paying off the debts of the testator, which cannot be liquidated in any other way.

(*e*) When the income accruing from the estate is not sufficient to defray the expenditure incurred in its management and the payment of the *kharâj* (land revenue).

(*f*) When it is in imminent danger of being destroyed or lost by decay.

(*g*) When the minor has no other property, and the sale of it is absolutely necessary for his maintenance.

(*h*) When it is in the hands of a usurper, and the guardian has reason to fear there is no chance of restitution.

In a case where disputes existed as to the title to revenue-paying land, of which part formed the minors' shares, and it was sold by their guardian for a fair price, and the sale had the result of ending the disputes and rendering the settlement of the remainder practicable, the validity of the transaction was maintained.[1] It was also held that although the sale deed incorrectly stated the purpose of the sale, yet on the transaction being afterwards impeached by the wards it was open to the guardian to prove the real nature of the sale and to show that it was one beneficial to them.

As a general rule, the powers of the testamentary guardian are subject to the same limitations, and extend to the same degree as the powers of the testator.

The Shiah Law is in general accord with the Sunni Law in respect to the powers of guardians.

Maintenance of Children.—The father is at all times bound to maintain his infant children. If the father be poor and the grandfather or the mother be rich, the obligation devolves on them, with a right of recourse against the father should he become possessed of means subsequently. The father is not bound to maintain his adult male children unless they are infirm or weak. He is authorised to engage his male children in work, though not adult, if they are strong enough to earn their own livelihood; but not in such work as is unsuited to their position. He is bound, however, to maintain his female children until they are married.

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[1] *Kalidut Jha* v. *Abdul Ali*, I.L.R., 16 Cal., 627.

PART III.

The Law Relating to Property.

CHAPTER I.

THE LAW RELATING TO GIFTS.

Section I.—General Observations.

Dispositions of property divide themselves under two heads, *viz.* :—

(1) Dispositions *inter vivos*.

(2) Dispositions which are in their nature testamentary, and which are not intended to operate until after the death of the person disposing.

A disposition made at a time when the disposer is suffering from a disease, which is technically death-illness (*marz-ul-mout*) stands, so far as its legal effect is concerned, on the same footing as a testamentary disposition.

The dispositions *inter vivos* with which we have principally to concern ourselves are *Hiba* and *Wakf*.[1]

Section II.—Hiba.

A *hiba* is a gift and is, generally speaking, divisible under three heads—

(*a*) A *hiba* pure and simple.

[1] Sale, bailment, etc., are governed by Statutes.

(*b*) A *hiba-b'il-ewaz* (a gift for a consideration), which is more in the nature of an exchange than a gift.

(*c*) A *hiba ba-shart-ul-ewaz* or a grant made on the condition that the donee should pay to the donor at some future time or periodically some determinate thing in return for the gift.

A *hiba* pure and simple, or a *hiba* properly so-called, is a voluntary transfer, or a grant, without consideration, by one person to another of some specific thing whether existing in substance, or as a *chose in action*.

A gift may be made verbally or in writing. The Transfer of Property Act leaves this provision of the Mahommedan Law untouched. And the Privy Council in the case of *Kamar-un-Nissa* v. *Bibi Hussaini Bibi*[1] upheld a verbal gift when it appeared to be supported by all the attendant circumstances.

The capacity for making a gift or voluntary settlement is dependent upon the same conditions as are required for the validity of any other contract, *viz.*:—

(1) Majority.

(2) Understanding.

(3) Freedom.

(4) Ownership of the subject-matter of the disposition.

In other words, a person, in order to be able to make a valid disposition, must be *sui juris*, must be able to understand the nature of the act, be subject to no undue influence, coercion or duress, and must be the owner on

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[1] I.L.R., 3 All., 266.

the property of which he purports to make the disposition. Any person may receive a gift without distinction of sex, or age or creed, provided he or she is in existence at the time of the gift. An absolute gift, therefore, to an unborn person, one not *in esse*, either actually or presumably, is invalid, but a gift to a child *en ventre sa mère* is valid, if the child be born within six months from the date of the gift, because in that case it is presumed that the child was actually existing as a distinct entity in the womb of its mother.

A death-illness (*Marz-ul-mout*) is defined to be a malady which it is highly probable will terminate fatally whether it incapacitates the donor from pursuing his ordinary avocations or not. When the malady is of long continuance and there is no immediate apprehension of death, the disease does not come within the category of *Marz-ul-mout*. A gift made by a person suffering from a disease which had lasted over a year, without any immediate apprehension of death has been held to be valid.[1]

Gifts made in *extremis* or at a time, when the donor is suffering from what is called a death-illness takes effect when made in favour of a non-heir, in respect of a third of the donor's estate unless assented to by the heirs. When made to an heir, it is altogether invalid unless it is assented to by the other heirs.

36 N 7[illegible]

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1 *Labbi Bibi* v. *Bibbun Bibi*, 6 N.W.P., High Court Reports, 159; *Muhammad Gulshere Khan* v. *Mariam Begum*, I.L.R., 3 All., 731; *Hassarat Bibi* v. *Ghulam Jaffar*, 3 Cal., W.N., 57.

Section III.—*Mouhoob*, or the Subject of the Gift.

Anything over which dominion or the right of property may be exercised, or anything which can be reduced into possession or which exists either as a specific entity or as an enforcible right, or, in fact, anything which comes within the meaning of the word *mâl*, may form the subject of a gift. *Choses in action* and incorporeal rights may form the subject of a gift equally with corporeal property.

A gift of property in the occupation of a tenant is lawful, for this implies the grant of the right to receive the rent from the occupying tenant or lessee. So also a gift may validly be made of the *mâlikana* interest in any given property.

A person may validly make a gift of an undivided part of any property which does not admit of partition. But under the Sunni Law, where the property is capable of partition, and the share is not divided off, the gift thereof is considered to be invalid; but if possession is delivered or taken, the invalidity is removed and the gift takes effect.

In the case of *Shaik Mahammad Mumtaz Ahmed and others* v. *Zubaida Jan and others*,[1] the Judicial Committee of the Privy Council gave effect to this principle. They held in accordance with the authorities on Mahommedan Law that possession taken under an invalid gift

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[1] L.R., 16 I.A., 205.

of *mushâa* transfers the property. They added that "the doctrine relating to the invalidity of gifts of *mushâa* is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules."

Undivided property is called *mushâa*. Freytag defines it as meaning "*pluribus communis*." In other words, every joint undivided property subject to the right of more than one individual is a *mushâa*.

The doctrine of *mushâa* has been held not to be applicable to zemindaris (*Abedoonnissa* v. *Ameeroonnissa*;[1] *Mallik Abdool Guffoor Musst. Muleeka*).[2]

Where a gift of a property which is capable of partition is made to two persons jointly, without specification of shares, the gift is invalid, but may be validated by the donees taking possession.

Where a gift is made to an infant and an adult jointly, it is valid.

Under the Shiah Law, a gift of an undivided part of property capable of partition is valid *ab initio*. So where a thing is given to two persons jointly, *i.e.*, without apportionment and they take possession jointly, each donee becomes the proprietor of the portion given to him. If, again, one only of them should accept the gift and take possession while the other should refuse, the gift to the acceptor would be valid.

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[1] L.R., 2 Ind. App., 87.

[2] I.L.R., 10 Cal., 1012; see also L.R., 16 Ind. App., 205.

Section IV.—Conditions necessary for the Validity of a Gift.

The following conditions are necessary for the validity of the act of gift:—

(1) A manifestation of an intention on the part of the donor; (2) the acceptance of the donee, either implied or express; and (3) the taking possession of the subject-matter of the gift by the donee, either actually or constructively.

The legal effect of every transfer depends on the intention of the transferor; and, as a gift or *hiba* under the Mussulman Law implies an absolute grant, the Moslem lawyers regard the question of intention as an essential element in considering the legal effect of a voluntary transfer. A gift, of course, does not take effect unless accepted by the donee. In ancient times, when transfers of property were not evidenced by documents, the giving and taking, selling and buying, were effected by actual change of possession. In cases of immovable property, the delivery of seisin was symbolical, and took the shape of what is called "feoffment" of seisin under the old English Real Property Law. Hence the early Mussulman lawyers laid much stress on delivery of seisin. According to the modern lawyers, "ability to take possession" (on the part of the donee) is tantamount to "delivery of seisin," and consequently where the donor places the donee in a position to take possession of the subject of the gift, the requirements of the law as to transmutation of

possession are satisfied. For example, where the donor delivers the key of a house to the donee, or the title-deeds of a property, it amounts to a valid gift.

In the case of a gift by a father to his minor child, no acceptance is necessary, "the gift is completed by the contract, and it makes no difference whether the subject of the gift is in the father's hands or in that of a depositary."[1] Nor is transmutation of possession necessary, for the possession of the father is tantamount to that of the child.

If a fatherless child be under the charge of his mother, and she take possession of a gift made to him, it is valid.

If a child is in the custody of, and is being brought up by a stranger, the possession of the stranger would be sufficient.[2]

If a minor girl is married and is living with her husband, a gift of which possession is taken by the father or the husband is equally good.

When a gift is made by a husband to a wife or by a wife to a husband, actual transmutation of possession is not necessary.[3]

Delivery of seisin is also not necessary where the subject of the gift is in the hands of the donee.

In considering the question of transmutation or delivery of possession the relationship of the parties must be kept in view. For example, if a husband make a gift of a

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1 I.L.R., 10 Cal., 1012.

2 *Fakhruddin* v. *Banoo Bibi*, 5 Sel. Reports, 40.

3 *Amina Bibi* v. *Khatija Bibi*, 1 Bom. H.C. Reports, 157.

house or landed property to his wife, and continue to reside in the house or to realise the rents and profits of the estate, the gift cannot be held to be invalid on that ground. For those acts are explainable by the relationship of the donor and the donee. Similarly, if the father makes a gift of his business to his minor son and continues to manage it for him, or an uncle gives some property to a nephew and continues to be supported by the donee, the gift will not be invalid on that account.

Section V.—Conditional Gifts.

In the Hanafî system there is great difference between conditional gifts and gifts with conditions attached to them. According to the Hanafî Law any derogation from the completeness of the gift is null; and if the intention be clear to give to the donee the entire subject-matter of the gift, subsequent conditions derogating from or limiting the extent of the right would be null and void. But where a condition does not render the gift nugatory, it is valid. For example, where a gift is made to *A* and it is conditioned that he should take it only for his life, the condition is void, and the gift would take effect absolutely. Or, if a man were to give a piece of land to another on the condition that he should give to him in perpetuity the whole produce of the land, the condition would be invalid. But where a gift is made to *A* absolutely, subject to a reservation of an interest in the usufruct of the property by the donor for his life, the reservation is valid.[1]

1 *Nawab Amjad Ali Khan* v. *Mohamdi Begum*, 11 Moo. I.A., 517.

Or, where a gift is made by *A* to *B* of a certain property without any restriction on the power of disposition, but subject to the condition that *B* should pay periodically to *A*, or to *A* and his heirs, *a part* of the usufruct of the property, both the gift and the condition would be valid. And if *B* should alienate the property, the assignee would take it subject to the condition. In a *hiba-ba-shart-ul-ewaz*, what is required is that the condition should be determined or fixed at the time of the grant or contract, and that it should not render the gift absolutely nugatory.

Under the Shiah Law, *conditional* gifts are valid; and limited estates are recognised to the fullest extent. For example, a *hiba* by *A* to *B* for *B's* life takes effect, under the Sunni Law, as an absolute gift to *B*. Under the Shiah Law, *B* would take, under such a grant, an estate for life, and on *B's* death the property would revert to the donor or his heirs. Similarly, under the Shiah Law, a grant to *A* for life and then to *B* absolutely, is valid; or a life-estate to *A* and then to *B* for life, and thereafter to *C* absolutely, is valid. So also a grant may validly be made to *A* for his life and thereafter to *A's* children absolutely. In other words, an estate for life or for several lives in succession is valid under the Shiah Law.

Section VI.—Revocation of Gifts.

Under the Hanafi Law, a gift is revocable except under the following circumstances:—

(1) When the subject-matter of a gift has passed out

of the possession of the donee by gift, sale, or any other form of alienation by which the right of property is transferred.

(2) When the donee is dead and the subject-matter of the gift has devolved on his or her heirs.

(3) When the donor is dead; in other words, the donor's heirs have not the power of revocation. The option of revocation is a personal right in the donor.

(4) When the thing given is lost.

(5) When the gift is for a consideration.

(6) When the subject-matter of the gift has altered in substance in the possession of the donee.

(7) When an increase or accretion has taken place in the thing given, and such increment or accretion is of such a nature as to be united with or inseparable from it. And it makes no difference in the irrevocability of the gift whether the increase be in consequence of an act of the donee or without such act, and whether it have issued from the thing itself (such as fruits on trees), or be an accession to it (such as accretion by growth). But it must be incorporated with, or form part of, the body of the subject-matter of the gift, and imply an addition to or, enhancement, in its value. Dyeing, sewing, porterage, etc., are considered as causes which extinguish the power of revocation.

Mere transfer from one place to another, when it adds to the value and has occasioned expense, is sufficient to prevent revocation. A separate increase does not prevent the revocation of a gift, nor does any loss or damage sustained by the subject of the gift.

(8) When the donor and donee stand towards each other in the marital relationship. But such a gift in order to be irrevocable must be made during the subsistence of the relationship. For example, a gift made prior to marriage may be revoked. But when a gift is made during marriage and the relationship is afterwards dissolved, the gift cannot be revoked. Difference in the creed of the married parties makes no difference in the irrevocable character of the gift.

(9) Relationship of blood within the prohibited degrees is a bar to revocation, without any restriction as to the creed of the donor or the donee.

(10) The natural growth of the subject-matter of the gift also debars the donor from revoking.

According to the Shiah Law, after possession has been taken of a gift, it cannot be lawfully retracted when made in favour of parents (according to general consensus), nor even when the donee is any other relative, by consanguinity, of the donor, or stands in the relation of husband or wife. But if the gift be to a stranger, it may be revoked at any time so long as the substance of the thing given is in existence. After it has perished there can be no revocation.

Section VII.—Gifts for Consideration.

The consideration for a gift may either be stipulated for in the contract of the gift, or be subsequent to the donation. When it is stipulated in the contract it is called a *hiba-bil-ewaz*.

A *hiba-bil-ewaz* is a sale in all its legal incidents and, consequently, delivery of seisin is not necessary.

Suppose, for example, a person in making a gift expressed himself to this effect, that he had made a gift of and conferred upon another the proprietary right in his entire property in lieu of something given by the donee, this is not a gift in consideration of an exchange, to be prospectively given, but it is a contract of mutual transfer or sale, both as to the condition and the effect. In such a case, seisin is declared not to be a requisite condition nor is the transfer revocable.

A *hiba-ba-shart-ul-ewaz* is a contract of a different description. The terms used in the constitution of such a *hiba* imply a *contingency*. Thus:—"I have given you this on condition of your giving me such a thing." This contract is declared to have the property of a sale, when the parties have given effect to it according to their meaning and intent.

CHAPTER II.

THE LAW RELATING TO WAKES.—

SECTION I.—GENERAL OBSERVATIONS.

THE word *wakf*, literally, signifies *detention*: technically, it means a dedication in perpetuity of some specific property for a pious purpose or a succession of pious purposes. When *wakf* is made of a property, the proprietary right of the grantor is divested therefrom, and it remains thenceforth in the implied ownership of the Almighty. The usufruct alone is applied for the benefit of human beings, and the subject of the dedication is rendered inalienable and non-heritable in perpetuity.

The person creating the trust, or making the dedication, is called the *wâkif* whilst the person or object for, whose benefit it is created is called the *Mowkoof alaih* (in the plural *Mowkoof alaihim*, *certuis qui trustent*.

Under the Mussulman Law, every object which tends to the good of mankind, individually or collectively, is a pious purpose. A dedication to a mosque signifies the support of a place of worship for human beings; to a caravanserai, the maintenance of a place of rest for travellers. Similarly, a provision for one's children, kindred or neighbours, is a pious object under the Mussulman Law.

Accordingly, a *wakf* may be made for a body of individuals one after another, and afterwards for the poor generally or for a mosque, *madrassa*, hospital, etc.

There is no essential formality or the use of any express phrase requisite for the constitution of a *wakf*. A *wakf* can be constituted by the use of any expression which conveys distinctly the intention of the donor to dedicate the property to a pious purpose.[1]

The settlor must be (1) free, *i.e.*, not a slave and not acting under compulsion; (2) must be sane; and (3) must be adult; and in order that the settlement may be valid in its entirety; (4) must be in good health, or, more correctly speaking, must not be suffering from an illness of which he subsequently dies; and (5) must be the owner of the property which forms the subject of the appropriation. A *wakf* created by a person suffering from a death-illness is valid to the same extent as a testamentary disposition.

A *wakf* is irrevocable; but a *wakf* made by a person to take effect after his death, or what is called a *wakf* by way of a *wasiat* (*wakf-bi'l-wasiat*), is revocable at any time before his death. A *wakf* intended to come into operation upon the death of the settlor will take effect in respect of one-third of his estate unless assented to by his heirs.

Under the Shiah Law, a testamentary *wakf*, which is intended to take effect only after the death of the *wâkif* is not valid. According to this school, a *wakf* made *in extremis* or when the person creating the dedication is suffering from a mortal illness, is valid as regards a

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1 See *Jewan Doss Sahoo* v. *Shah Kaleeroddeen Ahmed* 2 Moo. I.A., 398.

third of his estate (unless the heirs consent as to the entirety,) if there is a transmutation of possession, either express [1] or implied, or some change in the ownership of the property.

Perpetuity is a necessary condition to the constitution of a *wakf*, in other words, the property must be dedicated permanently. But it is not necessary that it should be so stated at the time of dedication. When a dedication is made by the term *wakf*, or any expression which conveys the meaning of permanent appropriation, it is sufficient. When any such expression is used the law will presume perpetuity. Where an object is mentioned which is liable to become extinct, the reversion will be for the poor although they are not expressly mentioned at the time of dedication.

The mere declaration of the dedicator (*wâkif*) that he constitutes or has constituted a property *wakf* is sufficient to impress on it the character of a valid *wakf*. Consignment to a *mutwalli* is not necessary.[2] If the *wâkif* continues in possession, he does so as a trustee for the beneficiaries. Under the Shiah Law, a *wakf* in order to be valid, must be for an object or objects which, individually or collectively, would presumably last always. If the *wakf* is primarily in favour of an object likely to fail, some other lasting object must be expressly mentioned. For example, if the *wakf* is for one's descendants, as they are likely to become extinct, the

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[1] See *Agha Ali Khan* v. *Altaf Hassan Khan*, I.L.R., 14 All., 429.

[2] *Doe dem Abdoollah Barber* v. *Jaun Beebee*, Fulton's Rep., 345.

reversion must be reserved in express terms for the poor or some other permanent charitable purpose, such as a Mosque or Imambara. The *wakf* must also not be dependant, for its operation, on a future contingency.

Under the Shiah Law, consignment to a *mutwalli* or trustee is necessary except in the case of *wakfs*, created for a pious purpose or the benefit of the public at large or large bodies of people. But such consignment is not necessary when the *wâkif* constitutes himself the *mutwalli* of the *wakf*. What is required is that there should be a transmutation of proprietary right and that the subject of the *wakf* should cease to be the property of the *wâkif*.

According to all the schools the *wakf* of movable property is as valid as that of immovable property. Accordingly, the *wakf* of money, Government Securities, and buildings without the land is lawful. So also is the dedication of a share in a property which is capable of partition (*mushâa*).

Section II.—The Different Kinds of *Wakfs*.

Wakfs are of three kinds, *viz.* :—

(1) For the affluent first, and after them for the indigent :

(2) For the affluent and indigent equally :

(3) For the indigent exclusively.

The first class of *wakfs* includes *wakfs* in favour of individuals.

1. A *wakf* or dedication may be made in favour of children unborn, contrary to the rule with regard to a

gift. When a *wakf* is in favour of the children of *A*, and he has no children; the usufruct, will be applied for the benefit of the poor, until children are born to him.

A *wakf* may be made in favour of—

(*a*) a Mussulman or a *Zimmi*,[1] but not in favour of an alien or *harbi* (an inhabitant of the *Dâr-ul-Harb*, i.e., an enemy);

(*b*) One's children and descendants, male and female, born or unborn;

(*c*) Similarly, other people's children and descendants;

(*d*) one's kindred, neighbours, dependants, servants, etc.;

(*e*) of strangers;

In other words, any person, except an alien enemy, irrespective of age or sex, may be constituted as the beneficiary of a *wakf*.

(*f*) under the Hanafî Law, a *wâkif* may constitute himself the first beneficiary of the trust, and if he does so he can lawfully reserve the benefit for himself, either wholly or partially.

A provision for the payment of the *wâkif's* debt is valid under the Hanafî Law.

Under the Shiah Law, the *wâkif*, if he reserves for himself the governance of the trust, can take the allowance, which he has fixed for the *mutwalli*; but he cannot derive nor reserve for himself any further benefit from the *wakf*.

Again, under the Shiah Law, the *mowkoof alaihim* or

[1] A non-Moslem fellow-subject.

cestui qui trustent must (1) be specified; and (2) that the *wakf* must begin with an existent object.

Where a *wakf* is made in favour of individuals, and no other purpose is mentioned, on the extinction of the persons for whom it is primarily created, it will enure to the benefit of the poor *who are the ultimate beneficiaries of all wakfs. A wakf*, therefore, can never be avoided by the failure of the objects for which it is primarily created.

Under the Mussulman Law, without any difference, a provision for one's family is an act of piety; and consequently, a *wakf* constituting the *wâkif's* own family or descendants, the primary recipients of the benefaction is not only valid in law but extremely meritorious. On failure of the dedicator's descendants, the *wakf* will go to the poor.

According to Abû Hanîfa and Imâm Mohammed, when a *wakf* is created in favour of objects liable to extinction, such as one's family or descendants, the ultimate and unfailing object must be distinctly mentioned.

According to Imâm Abû Yusuf, when a dedication is made with the word *wakf* or any of its synonyms, it is not necessary to mention the ultimate object; the law will presume it from the expression itself, and will, on failure of the objects designated, apply the *wakf* for the benefit of the poor.

The doctrine of Imâm Abû Yusuf is universally in force among the Hanafîs. The Bombay High Court seems to follow Imâm Mohammed's view though contrary to the recognised rule among the Hanafîs.[1]

[1] See I.L.R., 13 Bom., 264.

In the Calcutta High Court, there is some divergence of opinion, though all the old cases point to the recognition of Abû Yusuf's doctrine.

In *Abul Fata* v. *Mahomed Ishak* v. *Russomoy Dhur Chowdhry*,[1] the Judicial Committee of the Privy Council lay down the following principle:—That, under the Mahommedan Law, a perpetual family settlement expressly made as *wakf* is not legal merely because there is an ultimate, but illusory, gift to the poor. If this enunciation means that a *wakf* primarily in favour of one's descendant is not valid, then it must be respectfully submitted that the views expressed by their Lordships are opposed to the Mahommedan Law and the general *consensus* of Mahommedan nations.[2]

Even according to the enunciation of their Lordships, where it is proved that a substantial portion of the income is devoted to or is likely to be spent in purposes which, according to the law or customs and usages of the Mahommedans, are pious or meritorious, or in the performance of ceremonies and the distribution of charities on occasions regarded as sacred, the dedication would be valid.[3]

As a necessary corollary from the above proposition it follows, that when the *wâkif* has appropriated a substantial portion of the income for the maintenance of the dependant members of his family, relatives and servants,

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[1] L.R., 22 Ind. App., 76.

[2] See also the cases of *Meer Mahomed Israil Khan* v. *Sashti Churn Ghose* (I.L.R., 19 Cal., 412) and *Bikani Mia* v. *Shuk Lall Poddar*, (I.L.R., 20 Cal., 116).

[3] *Pholchand* v. *Akbar Yar Khan*, I.L.R., 19 All., 211.

either by periodical allowances or in the ordinary mode customary in Mahommedan households, the *wakf* would be lawful. In the case of *Meer Mahomed Israil Khan* v. *Sashti Churn Ghose*,[1] where the *wakf* was upheld, the *wâkif* set apart one-third of the income of the dedicated properties for the support of dependants, relatives, and servants, one-third for the preservation of the estate and the remaining one-third, as the allowance of the curator or *mutwalli*.

2. The second class of *wakfs* consists of dedications in the benefit of which both the affluent and the indigent are entitled to participate equally, as mosques, caravanserais, wells, etc.

3. The third class includes such *wakfs* as are exclusively for the indigent, as poor-houses, *langarkhânas*, etc.

The right of a person in a building or place which he proposes to consecrate for a *masjid* or *mussalla* (prayer-ground), becomes extinguished either upon the express declaration of the *wâkif* or by the performance of prayers in the place. Prayers offered by a single person are sufficient. A mosque cannot be erected on the property of another person without the permission of the owner, express or implied.

So, in the case of a cemetery, the burial of one corpse is sufficient to divest the proprietary right, provided the owner has the intention of dedication. Lands which are not expressly dedicated for a cemetery but are covered by graves are regarded as consecrated, and consequently

[1] I.L.R., 19 Cal., 412.

inalienable and non-heritable. But when there are only one or two graves, the particular spots where the bodies are buried are regarded as sacred.

Dargâhs are the shrines of saints and are consecrated grounds. A *wakf* in favour of a *Dargâh, Imâmbarah,* or *Khânkâh,* etc., is valid. A *Khânkâh* is in the nature of a monastery or convent where religious devotees congregate or reside for religious instruction or spiritual communion.

The *cypres* doctrine, well-known in English law, is applicable to all *wakfs* in the Mahommedan system. Under the Mahommedan Law, a *wakf* can never fail for want of an object, for it is distinctly provided that when the primary object fails the *wakf* will be applied for the benefit of an object nearest in character to the first; *e.g.*, when a *wakf* is created for a mosque situated in a particular locality, which becomes afterwards deserted, the law provides that the proceeds of the *wakf* should be applied to a neighbouring mosque; similarly, if the *wakf* be in favour of a poor-house, caravanserai, cisterns, etc.

Under the Hanafî Law, in the case of a *wakf* in favour of individuals, or of the *wâkif's* descendants generally, upon their extinction it will go to the poor whether they are mentioned or not.

Section III.—The *Mutwalli.*

It is lawful for the *wâkif* to reserve the *towliat* (the governance of the trust) for himself. And where a *wakf* has been created, but the *wâkif* has appointed no trustee or *mutwalli* for the administration of the trust, nor has

expressly reserved the *towliat* for himself, the office would nevertheless appertain to him *quâ wâkif*.

He has the power of appointing a *mutwalli* during his lifetime whenever he likes. Should he die without making any express appointment, the power devolves upon his executor. In the absence of an executor, as a general rule, the Kâzi has the power to nominate a *mutwalli*.

If the devotees or congregation of a mosque appoint a *mutwalli*, it is valid. Where the *wakf* is in favour of an ascertainable body of people limited in number, the beneficiaries may elect a manager.

The *mutwalli* should be (1) major, and (2) possessed of understanding.[1]

Freedom and Islâm are not necessary conditions.

A woman may be appointed a *mutwalli*, but if the officer has spiritual functions to perform which, as regards men, can only be performed by a man, women would not be eligible.

For example, the curator of a *Dargâh* or a *Khânkâh* is called a *Sajjâda-nashîn* (*Sajjâda* means a prayer-mat, and *Nashîn*, the person seated thereon). The *Sajjâda-nashîn* is a spiritual preceptor as well as the curator of the *Dargâh* or *Khânkâh* as the case may be. A female cannot be appointed as a *Sajjâda-nashîn*, while she can be appointed as a *mutwalli*.

The *wâkif* cannot remove the *mutwalli*, whom he has once appointed, unless he has reserved the power at the time of making the dedication.

The Kâzi has the power of removing a *mutwalli* for

1 See *Piran Bibi* v. *Abdul Karim*, I.L.R., 19 Cal., 203.

breach of trust, even though the appropriator should have made it a condition that there should be no such power.

The *mutwalli* cannot assign or transfer the office to any one, or appoint another whilst in good health and able to discharge his duties unless his own powers are "general," that is, unless he was appointed a *mutwalli* without any reservation and in respect of every particular relating to the *wakf*.

Where there is no rule laid down in the *wakfnâmah* as to the mode in which the appointment of a successor should be made, the *mutwalli* is authorised on his death-bed, or when incapacitated by old age from discharging his duties, to appoint a successor.

But where the *wâkif*, has laid down a rule or made some provision regarding the succession of trustees, the *mutwalli* will have no power of acting contrary to such rule, *e.g.*, if the *wâkif* has declared that the office shall descend in the lineal male line in a particular family, none of the incumbents will have the power to change the course of descent. Or, if the *wâkif* has declared that after *A*, *B* should succeed to the office, *A* has no power to appoint *C*. Nor can the Kâzi alter the succession.

So long as there is a relative of the *wâkif* in existence, qualified to hold the office, a stranger should not be appointed *mutwalli*.

A *mutwalli* cannot contract debts for the *wakf* unless they are made in consequence of, or pursuant to, the directions given by the *wâkif*. The *mutwalli* cannot create any charge on the *wakf* estate, or incur liabilities,

for which the *wakf* estate might be liable, unless such charge is created or debt is incurred under express powers given by the *wâkif*.

If a person make a *wakf* for his children (*awlád*) both males and females are included in its benefit.

If a man were to make a *wakf* for his descendants, without mentioning the order in which they should enjoy the income of the *wakf*, the near and the remote will take equally, in other words, the division will be *per capita*.

Alienation, temporary or absolute, by sale or mortgage of *wakf* property, even though purporting to be for the benefit of the endowment, unless made with the sanction of the Judge, previously obtained, is illegal according to the Mahommedan Law.

Section IV.—Right of Suit.

Where the *wakf* is of a public nature, every Mahommedan has an inherent right to maintain a suit, for the purpose of establishing the *wakf*, or his own right to share in its benefits.

Where there are several *mutwallis*, all of them, if possible, should be made plaintiffs; but if any of them refuse, then he or they should be made defendant or defendants.

A *cestui qui trust* cannot bring a suit without leave of the Kâzi, for the recovery of any property, which has been wasted or usurped, unless the *towliat* is in him also; but he can sue the *mutwalli*, if guilty of breach of trust, or to establish his title to a share in the profits of the *wakf*.

The position of *mutwalli* is like that of an executor. The dealing of one of two *wasîs* (executors), like the acts

of one of two *mutwallis* is void, for the two *mutwallis* and the two executors are like one in certain matters. But where the *wâkif* has associated another person with himself in the management of the trust, he can nevertheless act by himself.

Section V.—Directions of the *Wâkif*.

The directions of the *wâkif*, if in themselves lawful, are to be carried out in the same way as if they were enjoined by the law. But, in certain matters, the Kâzi is vested with the discretion of varying or altering them. For example, if a man were to make a dedication in favour of a particular object in a specified manner, the wishes of the donor will be carried out so long as the object exists, and, upon its extinction, it will be devoted to the poor. If he, however, were to say that the *mutwalli* should not be removed even if found guilty of breach of trust, the Kâzi, nevertheless, has the power of removing the *mutwalli* on its being established that he had committed a breach of trust. So, also, if a man were to provide for the distribution of alms in kind, the Kâzi may commute it into money-payments.

The Kâzi is vested with the discretion of making such alterations in the management of the *wakf* as might be for its benefit, and at the same time generally consistent with the wishes of the *wâkif*; for example, if a man were to provide that the *wakf* property should not be leased for more than a year, and it be found impossible to lease the land for so short a period, the Kâzi can authorise the *mutwalli* to grant a lease for a longer term

CHAPTER III.

WILLS.

Section I.—General Observations.

Wasiat means the act of conferring a right in the substance or the usufruct of a thing after death.

It may be constituted by the use of any expression that sufficiently indicates the intention of the testator; so long as it is apparent that the intention of the testator is to make a disposition operative on his death, it will be regarded as a *wasiat*. The devise may be either to the legatee beneficially or in trust for some purpose or object, and may be constituted, by saying, "I have bequeathed such a thing to such an one," or "I have bequeathed towards such an one," or by any other word or words that convey the idea of a disposition dependant for its operation upon the death of the testator.

The Mahommedan Law does not insist that a will should be in writing, and a nuncupative will, if proved, is as valid as a testamentary disposition reduced to writing.

So a will may be made by signs, as in the case of a dumb person who does not possess the faculty of speech, but who can express his meaning by signs. So also in the case of a person who is a *marîz*, that is, suffering from a mortal illness, and unable from weakness to speak.

The character of the disposition, whether it is a will

or a disposition *inter vivos*, whether it operates *in præsenti* or *in futuro* as a *wasiat*, is dependant upon the intention of the testator.

A *wasiat* may be conditional or contingent. Where a devise is made dependant for its operation upon the happening of a contingency, if the contingency does not happen, it will not be given effect to.

Section II.—The Capacity of Testators.

Freedom is regarded by all the schools as a necessary condition.

Sanity, also, is a necessary condition to the validity of a *wasiat*.

Under the Mahommedan Law, the acts of disposition, by a person suffering from an illness, which induces the apprehension of death, and which eventually causes death, have only a qualified effect given to them.

The approved doctrine, as stated by Kahastâni, is that "*marz-ul-mout* is an illness from which death results, though the sufferer be not confined to his bed. A long-standing illness is not regarded as a death-illness, so as to overpower the disposing faculty of the sufferer and restrict his capacity to make a disposition of his entire estate on the ground that when it has existed for a long period, it has become a part of his nature as in the case of the blind, the lame, etc. A death-illness is accordingly a disease from which death is imminent, and this happens when it goes on increasing until it ends with death, but where it remains stationary for a long time, or the progress is so imperceptible as to cause no fear to the suf-

ferer, when he becomes habituated to it, it is not death-illness."

An infant under the age of puberty does not possess the capacity of making a disposition of his property by will. But a *wasiat* made by a minor becomes effective *ab initio* upon his confirming or ratifying the same after attaining majority.

A bequest by a person who has taken poison with the intention of committing suicide is not valid if made after he has actually taken the poison.[1]

A *wasiat* in favour of a person who intentionally causes the death of the testator is unlawful according to all the schools.

According to all the schools, a bequest to any one of the heirs is not valid, without the consent of the others. But when it is in favour of non-heirs, it is valid and operative in respect of one-third of the testator's estate, without the assent of the heirs, and in respect of the whole with the heirs' consent. Under the Shiah Law, such consent in the case of a legacy to an heir or a non-heir may be given either *before* the testator's death or after. Under the Hanafî Law, it must be given *after* his death.

When a bequest is made in favour of two persons, which in the aggregate exceeds one-third of the testator's estate, and the heirs do not consent, there must be a proportionate reduction. When a bequest to an heir or to a non-heir exceeds one-third of the testator's estate, and some of the heirs consent whilst some do not, in

[1] See *Mazhar Hoosain* v. *Bodna Bibi*, L.R., 25 I.A., 219.

one case, the bequest, in the other the excess, will come out of the shares of the consenting heirs.

The funeral expenses of the deceased must be first paid out of the estate of the deceased and then the legacies and debts. After these have been paid, the heirs are entitled to partition the property. But a partition before payment of debts and legacies is not invalid.[1]

A disposition in favour of an infant *en ventre sa mère* is valid according to all the sects.

A *wasiat* is lawful in favour of the following objects, among others:—

(*a*) to the poor generally or a particular body of them ;

(*b*) to the holy shrine of the *Kaaba* or any mosque;

(*c*) to Almighty God, or to spend in the way of God (*sabîl-illâh*);

(*d*) for *wujûh-ul-khair* or *wujûh-ul-birr* (good or charitable purposes) generally ;

(*e*) " to fight in the way of the Lord, " *i.e.*, holy warfare ;

(*f*) for the children of one's heir, the kindred, neighbours, etc. ;

(*g*) for the emancipation of slaves ;

(*h*) for the payment of one's debts ;

(*i*) a bequest for feeding cattle is also lawful.

A will is essentially revocable in its nature. It may be revoked at any time, even during the last illness of the testator.

Revocation may be either express or implied, made either directly or indirectly. It is express when the test-

[1] See ante, p. 11.

ator revokes the *wasiat* in express terms. It is implied or indirect when the testator indicates by his conduct or his subsequent acts that he does not intend to maintain the legacy.

Section III.—Revocation.

As regards the mode and capability of revocation, bequests are usually divided into four categories; the first can be revoked either in express terms or by implication, *i.e.*, by conduct; the second kind may be revoked only by express words; the third, by conduct only; and the fourth cannot be revoked at all. The first kind of bequests consists of specific legacies which can be revoked by an express declaration of the testator to that effect, or by his selling or transferring the subject of the bequest in such a manner as to place it beyond his power to cancel or reverse the transfer. The second kind of bequest is, where the testator bequeaths a third or fourth share of his property to any person. In such a case, the legatee is entitled to that particular share in any property, which might be left by the testator at the time of his death, and consequently, unless a revocation of the bequest is made in express terms, the legacy will take effect. The third kind of bequest is qualified emancipation which can be withdrawn only by express conduct. The fourth kind of *wasiat*, which cannot be cancelled either expressly or impliedly, is absolute emancipation.

According to the Shiah doctrines, an acceptance before the death of the testator is lawful.

According to the Hanafî Law, an acceptance before the death of the testator is of no effect.

A bequest may be accepted either expressly, or by implication. If the legatee die before expressing either rejection or acceptance of the bequest, he would be presumed to have accepted the same, and his heirs would inherit the legacy.

Section IV.—Executors.

The testator has the power of confiding the execution of his last wishes to whomsoever he likes, and, subject to certain restrictions, the executorship may be entrusted either to a man or a woman, a stranger or a relative. And though a testamentary disposition may be invalid, the appointment of the executor, so far as the guardianship of the minor children and their education are concerned, would be valid.

The appointment may be either limited to a special purpose or may be general.

The appointment of an infant under the age of puberty or of an insane person, whether permanently so or with lucid intervals, is unlawful. But a woman, a blind person, or "one who has even undergone the specific punishment for slander," may lawfully be appointed an executor.

According to all the schools, a Moslem cannot appoint a *harbi*, a non-Moslem subject of a hostile power, to be his executor whether such a non-Moslem be a *mustâmin* [1] or not. Such an appointment, if made, is liable to be cancelled by the Kâzi. The appointment of a *Zimmi*, a

[1] One who has entered the Islâmic territories under a guarantee of safety.

non-Moslem fellow-subject, is lawful, but the Kâzi may in his discretion, set it aside.

In *Mohammed Aminuddin and another* v. *Mohammed Kabiruddin*,[1] a Mussulman female had bequeathed the whole of her property to a stranger, and had appointed a Hindu as the executor to her will. Upon a reference by the Judges of the Sudder Court to the Kâzi-ul-Kuzzât and Muftis of the Court, they pronounced, (*a*) if the testatrix left no heirs, she was at liberty to bequeath the whole of her property; (*b*) if she had heirs, the bequest of more than one-third would depend on the consent of such heirs; and (*c*) though the appointment of other than a Moslem as executor to the will of a Moslem is lawful, yet the Kâzi might remove him, but that till regularly displaced all his acts are valid.[2]

The executor is termed *wasî* and *musî-ilehi*, and is defined to be an *amîn* or trustee appointed by the testator to superintend, protect, and take care of his property and children after his death. He is also his *kâim-mukâm* or personal representative.

The acts of one executor singly, like the acts of any one *mutwalli*, will not be *bâtil* (void) in the following cases, *viz.*, in the purchase of shrouds for the testator, in the payment of his funeral expenses, in the litigation of his rights, in the purchase of necessaries for his children, in the acceptance of gifts made to the testator, in the emancipation of specified slaves, in returning deposits (with the testator), and in the payment of specified legacies.

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[1] 4 Sel. Reports, 49.

[2] See also *Jehan Khan* v. *Mandly*, B.L.R., S.N., 16 ; S.C., 10 W.R., 185.

If there are co-trustees of lands, any one of them may receive the rents though all must join in a conveyance.

Section V.—The Powers of the Executors.

When the heirs of the testator are minors, the powers of the executor are, within certain limits, absolute. In case of necessity, he has the power of selling the property and investing the proceeds in other and more profitable kinds of property, after discharging any debts of the testator or debts incurred in the maintenance of his infant children. The sale, however, must be for an adequate consideration, "such as is reasonable among people of business." The executor cannot sell the property to himself or to any relative of his, whose evidence under the Mahommedan Law would be inadmissible against him. He can enter into a partition with the co-sharers of the deceased or the legatee, if any, in respect of the minor's shares in all kinds of property, both movable and immovable, "even with a slight inadequacy in the terms (*ghubn-i-yasîr*)." A partition, however, where the inadequacy is manifest or glaring, *i.e.*, great, is ineffective.

When all the heirs are minors, the allotment by the executor of the legatee's share, and the retention by him of the residue for the heirs, is valid and effective. And in case any portion of their share is lost in the hands of the executor, the minors have no right to be recouped, either by the legatee, or by the executor, unless it is occasioned by his wilful neglect or default. But when some of the heirs are adult and absent, the executor can lawfully enter into a partition on their behalf with the legatee

in everything except *akâr* or what is immovable, and to hold the shares of the minors for them. If all the heirs are adult, or some of them are adult and present, any partition made by him is void against those heirs who are adult, both with respect to movable and immovable property. But if the heirs, though *sui juris*, are absent, the partition effected by the executor is inoperative so far as the immovable property is concerned; in other words, if the heirs are adult but not present, the partition of movable property alone made by the executor with the legatee is valid.

When a person has appointed two executors, and one of them dies appointing the other as his executor, the surviving executor can act for the original testator as the sole executor.

An executor is entitled to nominate a successor to carry out the purposes of the will under which he himself was appointed an executor.[1]

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[1] See *Hafeez-ur-Rahman* v. *Khadion Hossain*, N.W. Rep., 106.

CHAPTER IV.

THE LAW OF PRE-EMPTION.

SECTION I.—GENERAL OBSERVATIONS.

THE right of pre-emption is the right possessed by one person to purchase a property in preference to another; and, in the Mahommedan system, is based upon considerations of convenience and the avoidance of the presence of a stranger amongst co-sharers or neighbours.

The Mahommedan Law of Pre-emption was introduced into this country with the Mahommedan Government, and in certain places it has become a part of the *lex loci;* for example, in Behar and the North-Western Provinces both Hindus and Mahommedans are entitled to claim the right of pre-emption. In other places, it depends upon custom. Generally speaking, in Lower Bengal the right is confined to Mahommedans, but in some places Hindus and Christians have exercised the right of pre-emption. Under the Mahommedan Law itself, the right of pre-emption may be claimed by any person, irrespective of his or her creed.

The right of pre-emption arises in respect of property transferred by one person to another for a consideration, but not in respect of property which has devolved by inheritance or been received by simple gift, or as a legacy. Where a gift is made for a consideration stipulated in the contract, the right of pre-emption takes effect.

It arises only after a complete transfer of the right, title, and interest of the transferor has taken place—and not where there is a mere agreement to sell or transfer, or where the transfer is only fictitious.

It takes effect only in respect of immovable property such as lands or houses.

This right has been held not to be applicable to large zemindaries, and has been pronounced to be a *strictissimi juris* and is liable to be defeated by non-compliance with certain preliminary conditions laid down by the law. It may also be defeated by certain devices which the law recognises.

Section II.—Persons entitled to Claim the Right of Pre-emption.

Under the Sunni Law three classes of persons are entitled to the right of pre-emption :—

1. Persons who are partners in the substance of the thing; these are called *shafî-i-sharîk.*

2. Persons who have a right of easement in respect of the property which forms the subject of the sale, or, to use the language of the Arabian lawyers, are sharers in the appendages; these are called *shafî-i-khalît.*

3. Persons entitled by vicinage, in other words, neighbours, whose property is contiguous to the subject of the sale; these are called *shafî-i-jâr.*

Under the Shiah Law, co-sharers in the property, that is, *shafî-i-sharîk* alone, are entitled to the right of pre-emption; but, as already stated, the customary law of pre-emption is the Sunni Law, and Shiahs are entitled

with Sunnis to claim the right of pre-emption founded upon a right of easement or on the ground of vicinage.

Section III.—Conditions on which the Right of Pre-emption Depends.

There are two essential formalities the performance of both of which is a condition precedent to enable a person to claim the right of pre-emption.

A person, who intends to advance a claim based on the right of pre-emption in respect of property which has been sold to another, must, immediately on receiving information of the sale, express in explicit terms his intention to claim the property. The intention must be formulated in the shape of a demand. No express formula is necessary so long as the assertion of the right, or what is called a demand, is expressed in unequivocal language; this is called *talab-i-mowâsibat* or *immediate demand.*

In making this demand there must be no delay on the part of the pre-emptor. It must follow immediately upon the receipt of the information. Any delay in the performance of this formality would defeat the right of pre-emption. It is not necessary, however, that this demand should be made in the presence of witnesses.[1]

The second condition is that the pre-emptor should with as little delay as possible under the circumstances, repeat his demand either on the premises in dispute, or in the presence of the vendor or the vendee before witnesses, invoking them to bear testimony to the fact. This

[1] 2 B.L.R. A.C., 12; 4 B.L.R., 171.

condition is called *talab-i-ishteshhâd* or *demand by invocation of witnesses.*

Failure to perform the demands in strict accordance with the requirements of the law will defeat the right of pre-emption.

The pre-emptor must offer to pay the same price which has been paid by the vendee.

One of the devices by which the right of pre-emption may be defeated is to exclude a piece of property, however small, contiguous to that of the pre-emptor, so as to separate his property from the property sold.

The claimant by virtue of the right of pre-emption is bound to pay for any improvement effected by the purchaser, unless the improvements are detachable. In case of deterioration in the hands of the purchaser, the pre-emptor is entitled to a deduction, unless the deterioration has taken place without the instrumentality of the purchaser, in which case the pre-emptor must pay the full value.

CHAPTER V.[1]

SALE.

Section I.—General Observations.

A *Bai* or sale is the voluntary transfer of some specific property by one person to another for some definite consideration.

It is not necessary, however, that the property should be in existence at the time of the contract. So long as it is forthcoming or found to be in existence at the time when the contract is to be performed, the transfer is valid. Barter and exchange are governed by the same rules as the transfer of property for money or tokens of value.

A sale may be effectuated either immediately at the time of the contract by mutual delivery of the property and the consideration, or may be postponed for completion to a future time. The first kind of sale comes under the head of *Bai-sirf*. A *Bai-sirf* is defined as "a pure sale in which the articles opposed in exchange to each other are both representatives of price. This is termed *sirf*, because *sirf* means a removal, and in this mode of sale it is necessary to remove the articles opposed to

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[1] I have added this chapter as it is included in the Law Course of the Calcutta University, though, as a matter of fact, the Principles of the Mohammedan Law applicable to Sales have been practically abrogated by the Contract Act and the Transfer of Property Act.

each other in exchange from the hand of each of the parties, respectively, into those of the other."

The second kind is generally called *sillim*, which is defined to mean "a contract, of sale, causing an immediate payment of the price, and admitting a delay in the delivery of the wares."

Sales are either absolute or conditional, imperfect or void.

An absolute sale is that which takes effect immediately.

A conditional sale is one contracted by an agent for his principal and dependant on the ratification of the latter, or, where one of the parties is a minor, on the consent of his guardian.

An imperfect sale is an agreement for sale, which takes effect on the delivery of the property sold and the consideration respectively.

A void sale is one where there is no legal consideration.

The consideration for a sale may consist of anything which possesses a value in the eye of the law duly agreed upon between the parties. But it must be fixed either at the time or be capable of determination.

Sale is contracted by declaration and acceptance, expressed in any language calculated to convey the meaning of the parties, by word of mouth or by letter, or by means of messengers.

An offer made by the purchaser cannot be restricted by the seller to any particular portion of the property regarding which the offer is made.

Proposal and acceptance absolutely expressed render the sale binding, but if a proposal is not accepted within the stipulated period, it falls to the ground.

Misrepresentation as to the description or quality of the goods renders the contract of sale void.

The parties to a contract of sale must understand the nature of the transaction. A lunatic may enter into a contract of sale in his lucid moments. So may a minor with the consent of his guardian.

A sale may be transacted by an agent acting on behalf of both vendor and vendee.

It is essential to the validity of every contract of sale that the subject-matter thereof, like the consideration, should be sufficiently determinate, and there must be no vagueness, or uncertainty in the terms.

Section II.—Option in Sales.

Both the vendor and the vendee may reserve an option for the rescission of the contract, but this option must be exercised within three days.

Acceptance on the part of the person reserving the option will complete the contract.

A condition to the effect that, if in the course of three days the purchaser does not pay the price, the sale shall be null and void, is lawful.

When the option is reserved by the vendor, the property remains in him, but when it is reserved by the vendee, and the property is made over to him and is lost or injured in his hands, he is responsible for the *price*.

But where the option was reserved by the vendor, the purchaser would be responsible for the *proper value* only.

A purchaser may reject an article upon inspection after purchase, although before seeing it, he should have signified his satisfaction.

If a person look at the front of a house, and then purchase it, he has no option of inspection, although he should not have seen the apartments; and so also if a person view the back of a house or the trees of a garden from without.

A purchaser discovering a defect in an article purchased, is at liberty to return it to the seller, unless he was aware of the defect beforehand.

When the payment is deferred to a future period, the time must be determinate and cannot be suspended on an event the occurrence of which is uncertain.

A re-sale of movable property cannot be made by the purchaser until the property shall have actually come into his possession.

But land may be re-sold previous to seisin by the first purchaser.

A warranty as to freedom from defect and blemish is implied in every contract of sale.

Where the property sold differs, either with respect to quantity or quality from what the vendor had described it, the purchaser is at liberty to recede from the contract.

When a piece of land is sold, nothing thereon which is detachable from it passes under the sale. Thus the fruit on a tree belongs to the seller, though the tree it-

self, being a fixture, appertains to the purchaser of the land.

The condition of option reserved by the vendee is annulled by his exercising any act of ownership, which changes the character of the property.

Where the property has not been seen by the purchaser, nor a sample (where a sample suffices), he is at liberty to recede from the contract, provided he may not have exercised any act of ownership, if upon seeing the property it does not suit his expectation, even though no option may have been stipulated.

When a vendee has not agreed to take the property with all its defects, he is at liberty to return it to the seller on the discovery of a defect of which he was not aware at the time of the purchase, unless it has deteriorated in his hands in which case he is only entitled to compensation.

When the purchaser has sold such article to a third person, he cannot exact compensation from the original vendor.

Where articles are sold and are found on examination to be faulty, complete restitution of the price may be demanded from the vendor, even though they have been destroyed in the fact of trial, if the purchaser had not derived any benefit from them; but if the purchaser had made beneficial use of the faulty articles, he is only entitled to proportionate compensation.

Where a person purchases a property and sells it to another, and it is then found to be defective, and he is compelled to refund the price, he would be entitled to

proceed against the original vendor, if the defect existed at the time of his purchase.

But the vendee may waive his right to compensation or to refund of the price, by any act which may imply acquiescence on his part.

Where the property sold is not capable of division without injury, and part thereof subsequently to the purchase is found to be defective, or to be the property of a third person, the purchaser is not entitled to keep a part and to return a part, demanding a proportionate restitution of the price for the part returned. He must either keep the whole, demanding compensation for the portion that is defective, or he must return the whole, demanding complete restitution of the price. It is otherwise where the several parts can be separated without injury.

APPENDIX.

I.

The acknowledgment by a man of the paternity of a child as his legitimate offspring has the effect of giving not only to the child but also to the mother the right of inheritance to the father, the law presuming from the acknowledgment of the legitimacy of the offspring a lawful union between the parents. For examlpe, *A* and *B* live together as husband and wife and have issue; there is no evidence that they were married; at the same time there is no "insurmountable bar to" their contracting a lawful marriage; *A* acknowledges the children, either in express terms or by conduct, that they are his *legitimate* offspring, such acknowledgment has the effect of giving a right of inheritance to the children as well as to *B*; *Mahatala Bibee* v. *Prince Halimuzzuman*, 10 Cal., L.R., p. 293. And the presumption of legitimacy is so strong in such cases that if a man were to say this is my child and do not say that 'it is mine by fornication,' the law will presume it to be legitimate.

II.

According to the legists of the primitive schools, the husband has the power of dissolving the marriage-con-

tract at his own free will. And he may delegate his power of *talâk* to anybody he likes, even to the wife herself. Accordingly, it often happens that at the time of marriage it is specially agreed between the parties that should the husband contravene any of the conditions of marriage or take a second wife, the first wife would be entitled to *talâk* the husband. This is called *tafwîz* or *delegation of authority*, and constitutes a valid agreement.

III.

"ALL who believe in a heavenly or revealed religion and have a *kitâb* or scripture, such as the Pentateuch or the Psalms of David, are *kitâbis* (scripturalists) and inter-marriage with them or eating of meat slaughtered by them is lawful." In the *Fatâwa-i-Alamgiri*, a *Majûsa* or Magian woman is placed in the same category as an idolatress. But Magianism or fire-worship is different from Zoroastrianism.

According to the Shiahs, even Magians stand on the same footing as Christians or Jews.

According to the *Fatâwa-i-Alamgiri*, the *Radd-ul-Muhtâr*, etc., "a *Moslem* is one who is a believer in the unity of God, and the divine mission of Mohammed."

IV.

A MARRIAGE contracted in the *bonâ fide* belief on the part of the husband that the woman was a widow or the divorcée of another man (when, as a matter of fact, the former husband of the woman was not dead, or had not divorced her, as the case may be) gives rise to the same

consequences as an *invalid* marriage. The man is not subject to *hadd* or the punishment for fornication, and the issue of the union are held to be his legitimate offspring. A *fortiori* when both parties enter into the contract *bonâ fide* believing that the first husband is either dead or has divorced the woman, the children are affiliated to the second husband.

V.

If a child is born at six months or more from date of marriage, its descent is established from the husband of the mother, whether he acknowledge it or remain silent," and if he should reject the paternity, "it would be established," says the *Fatâwa-i-Alamgiri*, "by the testimony of one woman to the fact of its birth." Of course such testimony would be rebuttable.

VI.

Under the Hanafî Law, if a man were to *talâk* his wife before consummation and she should be delivered of a child within six months from the time of the *talâk*, its paternity would be ascribed to him; while if the delivery should take place at six months or more, its descent from him would not be established.

When a woman is *talâked after consummation* of the marriage, and she is subsequently delivered of a child, its descent would be established up to ten months, according to modern views. In other words, if the child is born within ten months from the date of the divorce, it would be affiliated to the husband. The old view was two years, but it has now been abandoned.

When a widow or a divorcée remarries and is delivered of a child within ten months from the death of her first husband, or of her divorce as the case may be, and within six months from the date of the second marriage, the child is affiliated to the first husband.

VII.

Under the Hanafî Law, a marriage for a term of years is unlawful, but if the parties have lived together as husband and wife, it takes effect as a permanent contract and gives rise to all the consequences of a valid marriage.

An illegal condition annexed to a marriage does not cancel the marriage, but is in itself void.

VIII.

The acknowledgment by a man of a woman as his wife is valid when confirmed by her, provided she is not married to another husband or observing her probation, and the acknowledgor is not already married to her sister or to four other wives. Such acknowledgment, if valid, would give her the right of inheritance.

IX.

Women with whom marriage is prohibited on the ground of consanguinity are the following:—

"The *mothers, daughters,* sisters, aunts, paternal and maternal; brothers' daughters and sisters' daughters; and marriage or sexual intercourse with them, or even soliciting them to such intercourse, is prohibited for ever, that is, at all times and under any circumstance."

Mothers are a man's own mother, and his grandmothers on the father's or mother's side, and how high soever. *Daughters* are his own daughters, and the daughters of his sons or daughters, how low soever. Sisters are the full sisters and the half-sister on the father's or the mother's side; similarly, the daughters of brothers and sisters how low soever, include descendants of sisters and brothers of the half-blood. Paternal aunts are of three kinds: the full paternal aunt, the half-paternal aunt by the father (that is, the father's half-sister on the father's side), and the half-paternal aunt by the mother (or the father's half-sister on the mother's side). And so also the paternal aunts of his father, the paternal aunts of his grandfather, and the paternal aunts of his mothers and grandmothers. Maternal aunts are the full maternal aunt, the half-maternal aunt by the father (that is, the mother's half-sister on the father's side), and the half-maternal aunt by the mother (or the mother's half-sister on the mother's side), and the maternal aunts of fathers or mothers.

Those prohibited by reason of affinity are the following:—

The mothers of wives, and their grandmothers on the father's or mother's side; the daughters of a wife or of her children, how low soever (subject to the condition that consummation has taken place with their mother, that is the wife), whether the daughter be under the husband's protection or not. [The Hanafîs do not regard "retirement with a wife equivalent to actual consummation in rendering her daughters prohibited."] The third degree of affinity comprises the wife of a son or of a

son's son, or of a daughter's son, how low soever, whether the son have cohabited with her or not. The fourth degree includes the wives of fathers and of grandfathers, whether on the father's or mother's side, and how high soever. With all these marriage or sexual intercourse is prohibited for ever.

The prohibition of affinity is established by a valid marriage, but not by one that is invalid. So that if a man should marry a woman by an *invalid contract*, her mother does not become prohibited to him by the *mere contract*, but by sexual intercourse. And the prohibition of affinity is established by sexual intercourse whether it be lawful or apparently so, or actually illicit. When a man has committed fornication with a woman, her mother, how high soever, and her daughters, how low soever, are prohibited to him, and the woman herself is prohibited to his father and grandfathers, how high soever, and to his sons, how low soever.

X.

In ancient times there were two other modes of separation between husband and wife which, however, with the development of family life, have become wholly obsolete in Mahommedan countries at all advanced in culture. These two modes were called *Ilâ* and *Zihâr*. In the first, the man swore to have no relation with his wife for four months, and on the expiration of that period, without any resumption of marital duties in the interval, the separation became absolute. In the second, the man likened his wife to some prohibited female relative, and thereby sub-

jected himself either to a penance, or, under the decree of the Judge, to separate himself definitely from her.

Both these modes were in vogue among the pagan Arabs, and though countenanced to some extent by the Arabian Prophet, were so hedged round by strict conditions that they may be regarded as actually prohibited.

XI.

According to the Hanafî Law, the gift of a debt to the debtor is a release or discharge, and is valid, but if the debtor does not accept it, he is not released. The gift may be made not only to the debtor himself, but also, on his death, to his heir, whether adult or minor.

So the creditor may "make a gift of the debt," in other words assign it, to somebody else, but in order that such assignment may be valid, the donee must be authorised to take possession of the debt. But as all assignments of debts imply an authority to recover the same, the condition may be regarded as a refinement.

Among the Shiahs, there is a difference of opinion on this question. The great Jurist Imâm Jaafar at-Tusi and other eminent lawyers agree with the Hanafîs, whilst the author of the *Sharâya* holds that the gift of a debt can be made only to the debtor or his heir, and is effectual with or without his consent. The former opinion is, however, recognised in practice (*urf*).

XII.

An acknowledgment of a debt though made in *marz-ul-mout*, not being regarded as an act of bounty, is held

to be operative in respect of the whole estate of the deceased and not merely of a third.

XIII.

A DEDICATION or *wakf* of property subject to a mortgage, or in the possession of a lessee or tenant, is valid. When a property is dedicated which is subject to a mortgage, its income would be devoted to the discharge of the debt, and after it has been paid off, it would be applied to the purposes of the dedication. Under the Hanafî law a *wâkif* may lawfully make a dedication with the condition that the income of the property should be applied to his benefit or in the payment of his debts.

XIV.

WHEN a *wakf* is created in favour of one's children and their descendants, all the descendants of the *wâkif* existing at any one time are equally entitled, unless there are words to indicate that the generations are to take successively.

XV.

"AMONG the *Asabâh* the nearest is the son; then the son's son, however low; then the father; then the father's father, however high; then the brother by the father and mother; then the brother by the father; then the full brother's son; then the son of the brother by the father only; then the full paternal uncle; then the half paternal uncle on the father's side; then the son of the full paternal uncle; then the father's full paternal uncle;

then the father's half paternal uncle on the father's side; then the son of the father's full paternal uncle; then the son of the father's half paternal uncle on the father's side; then the paternal uncle of the grandfather and so on: so in the *Mabsût.*" (It must be remembered that where sons are spoken of, it means the lineal male descendants.)

XVI.

Consanguine sister or sisters with one full sister and no excluder ($\frac{2}{3} - \frac{1}{2} = \frac{1}{6}$).

One full sister and several consanguine sisters: full sister, $\frac{1}{2}$; consanguine sisters, $\frac{1}{6}$ or as $\frac{3}{6} : \frac{1}{6}$, ∴ full sister $= \frac{3}{4}$, consanguine sisters divide $\frac{1}{4}$ equally.

Two daughters, two son's daughters, three consanguine sisters: Two daughters$= \frac{2}{3}$; three consanguine sisters being residuaries with daughters, get $\frac{1}{3}$; son's daughters not being sharers or residuaries with daughters are excluded.

Two son's daughters, one full sister and several consanguine sisters: the full sister excludes consanguine sisters owing to propinquity to the deceased and takes the residue; ∴ 2 son's daughters $= \frac{2}{3}$; full sister$= \frac{1}{3}$.

Husband, mother, three full sisters, four consanguine brothers and sisters: husband$= \frac{3}{6}$, mother$= \frac{1}{6}$, 3 full sisters$= \frac{4}{6}$, 2 uterine brothers and sisters$= \frac{2}{6}$. Here the consanguine brothers and sisters have no shares left and the doctrine of increase comes into force, and ∴ husband $\frac{3}{10}$, mother$= \frac{1}{10}$, 3 full sisters$= \frac{4}{10}$, 2 uterine brothers and sisters $= \frac{2}{10}$, (these being legal sharers

divide equally and are preferred to consanguine ones).

XVII.

In the case of *Skinner* v. *Skinner*, it appeared that two persons, a man and a woman, were married as professed Christians in a Church, and that subsequently they had adopted Mahommedanism and gone through the Mahommedan form of marriage. The husband died, leaving a will excluding the wife from all participation in his estate. It was held by the Privy Council that the personal status of the deceased being at the time of his death that of a Mahommedan, and the plaintiff's personal status being that of his wife under the same law, she was entitled to a share in his estate notwithstanding his will, which purported, but under the Mahommedan law, was inoperative, to exclude her.

XVIII.

In the case of *Agha Mahommed Jaffer Bindamin* v. *Koolsoom Beebee*[1] the Judicial Committee of the Privy Council has held that a Mahommedan widow is not entitled to maintenance out of the estate of her late husband in addition to what she is entitled to by inheritance, or under his will.

XIX.

In the same case the Judicial Committee held that the mere handing over by the deceased of certain deposit

[1] I.L.R., 25 Cal., 9.

notes signed by the Agent of a Bank, acknowledging the receipt of sums of money as deposit bearing interest and not in a form which would entitle the bearer of the notes to the debts created thereby as transferee thereof, did not amount to a transfer of the debts so as to give the widow any dominion over them or enable her to recover the money secured by the notes. At most, the evidence showed an intention to make such a transfer, but that the gift was incomplete and no legal effect could be given to it.

XX.

A MAHOMMEDAN of the Shiah sect cannot maintain a claim for pre-emption based on the ground of vicinage under the Mahommedan Law, when both the vendor and the vendee were Sunnis; *Qurban Hosain* v. *Chote*.[1]

XXI.

A TESTAMENTARY disposition may be made by a letter written before the testator's death, containing directions as to his property and conferring the proprietary right therein in equal shares on certain persons to take effect on his death; *Mazhar Husen and Bodha Bibi and another*.[2]

It is possible to make a valid gift under the Mahommedan Law of property attached by the Collector for arrears of revenue by the donor transferring possession of such interest as he had at the time of the gift; it not

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[1] I.L.R., 22 All., 102.

[2] *Ibid.*, 91.

being necessary that he should transfer possession of the corpus of the property; *Anwari Begum* v. *Nizam-ud-din Shah.*[1]

XXII.

WHERE a pre-emptor by reason of the claim of other persons entitled equally with himself to claim pre-emption is only entitled to a certain portion of the property in respect of which he claims pre-emption and not to the whole of it, he is not bound to frame his suit for the whole of the property sold, but only for so much as he would be entitled to, having regard to the claims of the other pre-emptors; *Abdullah* v. *Amanatullah.*[2]

Where a pre-emptor sued for possession, by right of pre-emption of certain property sold by one and the same sale-deed, claiming as to one portion of the property sold under the Mahommedan Law and as to another under the *Wajib-ul-arz*, and it was found that he had by his own acts or omissions disentitled himself from claiming that portion of the property to which the Mahommedan Law applied, it was held that the pre-emptor was not entitled to pre-emption in respect of any portion of the property covered by the deed of sale; *Majibullah* v. *Umed Bibi and another.*[3]

Where a plaintiff, who had filed a suit for pre-emption based on the provisions of a *Wajib-ul-arz*, lost during the pendency of the suit, the right to pre-empt by

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[1] I.L.R., 22 All., 165.

[2] I.L.R., 21 All., 292.

[3] *Ibid.*, 119.

reason of the *mahal* in which both properties were originally comprised having become the subject of a perfect partition, it was held that the suit for pre-emption should be dismissed; *Ram Gopal* v. *Piari Lal*.[1]

XXIII.

The plaintiffs sued to recover possession of certain lands, upon the allegation that those lands had been granted in *wakf* to their ancestor and his lineal descendants to defray the expenses for, or connected with the services of a certain mosque; and that their father (defendant, No. 3) and cousins (defendants Nos. 4 and 5), who were *mutwallis* in charge of the said property, had illegally alienated some of the *wakf* property, and had also ceased to render any service to the mosque, whereupon they (the plaintiffs) had been acting as *mutwallis* in their stead. They, therefore, claimed to be entitled as such to the management and enjoyment of the lands in dispute. It was contended by the defandant (*inter alia*) that the plaintiffs could not sue in the life-time of their father (defendant No. 3), he not having transferred his right to them.

The Court held that the plaintiffs were entitled to sue to have the alienations made by their father and cousins set aside, and the *wakf* property restored to the service of the mosque. They were not merely beneficiaries, but members of the family of the *mutwallis*, and were the persons on whom, on the death of the existing *mutwallis*, the office of *mutwalli* would fall by descent, if, indeed, it had

[1] I.L.R., 21 All., 441.

not already fallen upon them, as alleged in the plaint, by abandonment and resignation.

When a suit is brought to set aside an alienation made to a stranger, such a suit by the worshipper at a mosque or temple can be maintained and does not fall within section 539 of the Civil Procedure Code (Act XIV of 1882). That section is only applicable where there is an alleged breach of trust created for a public, charitable, or religious purpose, and the direction of the Court is necessary for the administration of the trust. As against strangers, section 539 does not apply; *Kazi Hassain* v. *Sagun Bal Krishna.*[1]

XXIV.

As a Mahommedan cannot dispose of, from his heirs by will, more than one-third of his estate, his will is not revoked by marriage.

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[1] I.L.R., 24 All., 170.

INDEX.